

No. 87-1372-CFX
Status: GRANTED

Title: Argentine Republic, Petitioner
v.
Amerada Hess Shipping Corporation, et al.

Docketed:
February 16, 1988

Court: United States Court of Appeals
for the Second Circuit

Counsel for petitioner: Ristau, Bruno A.

Counsel for respondent: Burnett, Douglas R., Burke
Jr., Raymond J.

Entry	Date	Note	Proceedings and Orders
1	Feb 16 1988	G	Petition for writ of certiorari filed.
2	Mar 18 1988		Brief amicus curiae of United States filed.
3	Mar 21 1988		Brief of respondent Amerada Hess Shipping in opposition filed.
4	Mar 23 1988		DISTRIBUTED. April 15, 1988
5	Mar 30 1988	X	Reply brief of petitioner Argentine Republic filed.
6	Apr 18 1988		Petition GRANTED. *****
8	May 9 1988		Order extending time to file brief of petitioner on the merits until June 30, 1988.
9	Jun 17 1988		Record filed.
		*	Certified copy of original record and proceedings, box, received.
10	Jun 30 1988		Brief of petitioner Argentine Republic filed.
11	Jun 30 1988		Joint appendix filed.
12	Jun 30 1988		Brief amicus curiae of United States filed.
14	Jul 7 1988		Order extending time to file brief of respondent on the merits until August 30, 1988.
15	Jul 8 1988	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
16	Aug 12 1988	G	Application (A88-133) to file a respondents' brief in excess of page limits, submitted to Justice Marshall.
17	Aug 18 1988		Application (A88-133) granted by Justice Marshall, allowing a maximum of 65 pages.
25	Aug 22 1988	D	Motion of respondents and amici curiae Republic of Liberia for divided argument to permit Republic of Liberia to participate in oral argument as amicus curiae filed.
18	Aug 25 1988	G	Motion of Republic of Liberia for leave to file a brief as amicus curiae filed.
20	Aug 29 1988	G	Motion of American Institute of Marine Underwriters for leave to file a brief as amicus curiae filed.
19	Aug 30 1988	G	Motion of American Institute of Merchant Shipping, et al. for leave to file a brief as amici curiae filed.
21	Aug 30 1988	G	Motion of Maritime Law Association for leave to file a brief as amicus curiae filed.
23	Aug 30 1988	G	Motion of International Human Rights Law Group for leave to file a brief as amicus curiae filed.
22	Aug 31 1988		Brief of respondents Amerada Hess Shipping Corp., et al. filed.

Entry	Date	Note	Proceedings and Orders
24	Sep 1 1988	G	Motion of International Association of Independent Tanker Owners for leave to file a brief as amicus curiae filed.
26	Sep 15 1988		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
34	Sep 28 1988		CIRCULATED.
35	Sep 29 1988		Lodging received.
37	Sep 29 1988	X Reply	Reply brief of petitioner Argentine Republic filed.
36	Sep 30 1988		Set for argument. Tuesday, December 6, 1988. (1st case) (1 hr.)
27	Oct 3 1988		Motion of respondents and amici curiae Republic of Liberia for divided argument to permit Republic of Liberia to participate in oral argument as amicus curiae DENIED.
28	Oct 3 1988		Motion of Republic of Liberia for leave to file a brief as amicus curiae GRANTED.
29	Oct 3 1988		Motion of American Institute of Marine Underwriters for leave to file a brief as amicus curiae GRANTED.
30	Oct 3 1988		Motion of American Institute of Merchant Shipping, et al. for leave to file a brief as amici curiae GRANTED.
31	Oct 3 1988		Motion of Maritime Law Association for leave to file a brief as amicus curiae GRANTED.
32	Oct 3 1988		Motion of International Human Rights Law Group for leave to file a brief as amicus curiae GRANTED.
33	Oct 3 1988		Motion of International Association of Independent Tanker Owners for leave to file a brief as amicus curiae GRANTED.
38	Dec 6 1988		ARGUED.

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Supreme Court, U.S.

FILED

FEB 16 1988

ROSEMARY E. SPANGLER, JR.
CLERK

No. _____

IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

ARGENTINE REPUBLIC,

Petitioner,

v.

AMERADA HESS SHIPPING CORPORATION AND
UNITED CARRIERS, INC.

Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT**

BRUNO A. RISTAU
Counsel of Record
KAPLAN RUSSIN & VECCHI
1215 Seventeenth St., N.W.
Washington, D.C. 20036
(202) 887-0353
Attorney for the Petitioner

QUESTIONS PRESENTED

1. Whether the Foreign Sovereign Immunities Act of 1976 (FSIA) is the exclusive jurisdictional basis for suits against foreign states in the courts of the United States.

2. Whether in passing the FSIA Congress tacitly approved suits by aliens against foreign states under the Alien Tort Statute of 1789 which empowers district courts to hear "any civil action by an alien for a tort only, committed in violation of the law of nations."

3. Whether a court of the United States has personal jurisdiction to hear a claim by an alien against a foreign state for a tort alleged to have been committed by its armed forces on the high seas in violation of international law.

The caption of the case in this Court contains the names of all parties.

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IN THE
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OCTOBER TERM, 1987

No.

ARGENTINE REPUBLIC,

Petitioner,

v.

AMERADA HESS SHIPPING CORPORATION AND UNITED
CARRIERS, INC.,

Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT**

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-21a, *infra*) is reported at 830 F.2d 421 (1987). The opinion of the United States District Court for the Southern District of New York (App. 25a-35a, *infra*) is reported at 638 F.Supp. 73 (1986).

JURISDICTION

The judgment of the court of appeals was entered September 11, 1987 (App. 22a, *infra*). The petitioner's timely petition for rehearing and suggestion for rehearing en banc were denied on November 18, 1987 (App. 24a, *infra*). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

1. The Fifth Amendment to the Constitution of the United States of America provides in pertinent part:

No person shall be . . . deprived of . . . liberty, or property, without due process of law;

. . .

2. The Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. §§ 1330, 1391(f), 1602-1611, reads in relevant part as follows:

§ 1330. Actions against foreign states

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has not been made under section 1608 of this title.

. . . .

§ 1604. Immunity of a foreign state from jurisdiction.

Subject to existing international agreements to which the United States is a party

at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in section 1605 to 1607 of this chapter.

§ 1605. General exceptions to the jurisdictional immunity of a foreign state.

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

. . . .

(5) not otherwise encompassed in paragraphs (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

3. The Alien Tort Statute of 1789, 28 U.S.C. § 1350, reads as follows:

§ 1350. Alien's action for tort

The district courts shall have original jurisdiction of any civil action by an alien for a tort only committed in violation of the law of nations or a treaty of the United States.

STATEMENT OF THE CASE

Respondents United Carriers, Inc. ("United Carriers") and Amerada Hess Shipping Corporation ("Amerada Hess"), two Liberian corporations, sued the petitioner in the district for an alleged tort committed in violation of international law on the high seas. The gravamen of respondents' claim was that during the Falkland Islands/Malvinas conflict between Argentina and the United Kingdom in 1982 Argentine aircraft attacked and caused the loss in the South Atlantic of a vessel owned by United Carriers and chartered by Amerada Hess.

Specifically, United Carriers' complaint alleged that it was the owner of a Liberian-registry tanker, the HERCULES; that the vessel was engaged in carrying crude oil from Alaska, via the Cape Horn, to a refinery in the Virgin Islands; that on June 8, 1982, while on a return voyage under ballast from the Virgin Islands to Alaska, the HERCULES was attacked and bombed in the South Atlantic by aircraft of the Argentine armed forces; that as a result of these attacks the vessel suffered damages and was diverted to the port of Rio de Janeiro where it was determined that an undetonated bomb was lodged in one of the vessel's tanks; that some six weeks later the owners decided to scuttle the vessel to avoid the risks inherent in an attempt to remove the undetonated bomb; and that the vessel was scuttled in the Atlantic on July 20, 1982, some 250 miles off the coast of

Brazil. United Carriers claimed damages for the loss of the vessel in the amount of \$10 million. It sought to vest jurisdiction in the district court exclusively under the Alien Tort Statute, 28 U.S.C. § 1350.

The factual allegations in Amerada Hess' complaint paralleled those in United Carriers' complaint. As to damages, Amerada Hess asserted that it had entered into a time-charter for the HERCULES with United Carriers and that at the time the HERCULES was scuttled it carried bunkers owned by Amerada Hess valued at some \$1.9 million, for which amount it claimed damages. Amerada Hess sought to vest jurisdiction in the district court on three separate bases: the Alien Tort Statute, general admiralty and maritime jurisdiction, and universal jurisdiction for violations of international law.¹

Petitioner moved to dismiss under Rule 12(b), F.R.Civ.P., for lack of subject matter and personal jurisdiction, and the district court dismissed the suits for lack of subject matter jurisdiction (App. 35a). The district court concluded that the FSIA was the exclusive source of jurisdiction in suits against foreign states and that the petitioner was immune from suit under the express provisions of that Act (App. 28a-31a). The court did not address the question of personal jurisdiction.

¹ Both respondents expressly disclaimed reliance on the FSIA as a jurisdictional predicate for their suits (App. 38a, 41a), although they caused service of their complaints to be made on the petitioner's Minister of Foreign Affairs in conformity with the service provisions of § 1608(a)(3) of the FSIA, viz., by mailing the summonses, complaints and the statutory notices of suit to him (*ibid.*).

The district court rejected respondents' contention that the Alien Tort Statute provided an independent source of jurisdiction for suits against foreign states when the aggrieved party is an alien. It further rejected respondents' argument that Congress, in passing the FSIA, intended to preserve those provisions of the First Judiciary Act, which, according to respondents', allowed aliens to assert claims against foreign sovereigns for violations of international law. The district court concluded (App. 31a):

Both the premises and the conclusion of this inventive argument must be rejected. First, we do not credit plaintiffs' contention that the Argentine Republic would not have enjoyed foreign sovereign immunity in an action such as this in 1789. Second, even if we accept plaintiff's version of legal history, the language of the Alien Tort Act is silent as to foreign sovereign immunity. Therefore, the FSIA does not repeal the Alien Tort Act any more than it repeals any other jurisdictional act that by its terms may include actions brought against foreign sovereigns.

The district court also rejected Amerada Hess' alternative claim that the district court hear its civil claim against petitioner based on the "principle of universal jurisdiction," holding that doctrine only provides for criminal jurisdiction (App. 35a).

On appeal, a divided panel of the court of appeals reversed. The majority held that the FSIA did not preempt the jurisdictional grant of the Alien Tort Statute and that the district court was competent to hear respondents' claims under that Act (App. 10a).

In the majority's view it was irrelevant that a court faced with the circumstances of this case when the First Judiciary Act was enacted two centuries ago would not have exercised jurisdiction over a foreign sovereign (App. 8a). Since in the majority's view the Alien Tort Statute contained a jurisdictional grant based on the "evolving standards of international law" (App. 9a), and since "attacking a neutral ship in international waters, without proper cause for suspicion or investigation, violates international law" under existing international standards (App. 7a), respondents could invoke the aid of a United States court under the Alien Tort Statute to assert their claims against the offending foreign state.

Turning to the jurisdictional provisions codified in the FSIA for suits against foreign states, the majority acknowledged that some three years earlier—in *O'Connell Machinery Co. v. M.V. "Americana"*, 734 F.2d 115, *cert.denied*, 496 U.S. 1086 (1984)—the Second Circuit had held that "the [FSIA] insulates foreign states from the exercise of federal jurisdiction, except under the conditions specified in the Act" (App. 11a), and that this Court "expressed similar views" in *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983) (*ibid.*). Stating that "the view of the FSIA as the sole basis for United States jurisdiction over foreign sovereigns can be traced to the statute's legislative history" (*ibid.*), the majority proceeded to "a close examination" of the legislative history of the FSIA and concluded that in enacting the FSIA "Congress did not intend to remove existing remedies in United States courts for violations of international law of the kind presented here" (*ibid.*). In the majority's view, the focus of the FSIA was

principally on "commercial concerns" (App. 12a), and international law violations outside the commercial context—such as confiscations—"were not the focus of the 'comprehensive' language of the drafters of the FSIA any more than they were the focus of the Supreme Court in the *Verlinden* case" (*ibid.*). The majority concluded that—

Thus, although Congress did not focus on suits for violations of international law, it clearly expected courts to apply the international law of sovereign immunity. As we have seen, under international law, Argentina would not be granted sovereign immunity in this case. Therefore, a grant of immunity here would fly in the face of this central premise. Since Congress did not express a clear intent to contradict the immunity rules of international law, and, indeed, left the Alien Tort Statute in force, we conclude that the FSIA does not preempt the jurisdictional grant of the Alien Tort Statute.

(App. 13a).

The majority then addressed the question of personal jurisdiction over the petitioner, recognizing that "even given the jurisdictional grant of the Alien Tort Statute, the district court must have constitutionally satisfactory personal jurisdiction over the defendant" (App. 14a). The majority concluded that petitioner's actions, as alleged, had a sufficient nexus with the United States so that the exercise of personal jurisdiction would not offend notions of fair play and substantial justice as mandated by the Due Process

Clause. It deemed the following factors of jurisdictional significance (App. 14a-15a):

- Argentina was on notice that it might be sued here;
- The United States had notified Argentina that the *HERCULES* would be passing through the South Atlantic on neutral business;
- The vessel was plying the United States domestic trade;
- Argentina was aware of the United States' interest in protecting the freedom of the high seas;
- Argentina has the means to defend a suit in the United States;
- If the United States were to decline jurisdiction, substantive policies of international law would be undermined; and
- Fairness favors the exercise of jurisdiction, since the respondents claimed that they were unable to obtain a remedy in Argentina.

In light of these factors, the majority concluded that there is "no constitutional bar to the district court's exercise of personal jurisdiction over Argentina here" (App. 15a). In consequence, the court of appeals reversed and remanded the cases to the district court for further proceedings.²

² At the invitation of the court of appeals, the United States filed an *amicus* brief; the United States urged affirmance of the dismissal of the complaints for lack of jurisdiction.

The dissenting judge expressed skepticism at the notion that, in enacting the Alien Tort Statute, the First Congress intended to allow federal subject-matter jurisdiction to ebb and flow with the vicissitudes of "evolving standards of international law," in light of the settled rule that federal court subject-matter jurisdiction is not a matter of common law (App. 19a).

In the dissenter's view, the express provisions of the FSIA and its legislative history made it abundantly clear that—

(1) the FSIA provides the exclusive framework within which the courts of the United States are to resolve a foreign state's claim of sovereign immunity, and (2) within that framework, recognition of such immunity is to be the rule, subject only to such exceptions as are expressly provided in the statute. Since the FSIA does not set forth any exception denying immunity in a case such as the present one, I would affirm the judgment of the district court dismissing this action.

(App. 21a).

REASONS FOR GRANTING THE WRIT

A. THE COURT OF APPEALS HAS DECIDED A FEDERAL QUESTION IN TOTAL DISREGARD OF A GOVERNING ACT OF CONGRESS, IN CONFLICT WITH AN APPLICABLE DECISION OF THIS COURT, AND IN CONFLICT WITH OTHER FEDERAL COURTS OF APPEALS ON THE SAME MATTER.

Contrary to the majority's holding below, the FSIA is an all-encompassing statute which sets forth both the substantive and procedural standards that govern

all suits that may be brought against foreign nations in state and federal courts in the United States. Although the statute provides that judicial, rather than executive, authorities should determine claims of foreign states to sovereign immunity from suit, it mandates that they must do so "*in conformity with the principles set forth in this chapter*" (§ 1602, emphasis added). The principles prescribed by Congress in the FSIA embody the "restrictive" theory of sovereign immunity—*Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 487 (1983)—under which foreign nations are subject to suit only "insofar as their commercial activities are concerned," i.e., for activities *jure gestionis* (§ 1602). With one exception noted below, non-commercial, governmental or sovereign activities of foreign states—activities *jure imperii*—cannot be made the subject of suit in the courts of the United States as a matter of established international law which Congress expressly incorporated into the FSIA.

To achieve these goals, the FSIA broadly provides that federal district courts "shall have original jurisdiction without regard to amount in controversy of any non-jury civil action against a foreign state . . . as to any claim . . . with respect to which a foreign state is not entitled to immunity" under the terms of the statute or any applicable international agreement (§ 1330(a)). The FSIA announces detailed standards for determining when immunity is to be accorded. The fundamental principle on which the statute is structured is that foreign states are "*immune from the jurisdiction of the courts of the United States and of the States*" unless an exception is found within the statute or applicable international agreements (§ 1604, emphasis added). Statutory exceptions from this

general grant of immunity exist when immunity has been waived (§ 1605(a)(1)), when the claim arises from specified commercial activities of the sovereign state (§ 1605(a)(2)), when rights in property *taken in violation of international law* are at issue (§ 1605(a)(3)), when rights in specified property situated in the United States are involved (§ 1605(a)(4)), and when claims based on tortious injuries to persons or property occurring within the United States are in question (§ 1605(a)(5)). Finally, the FSIA also denies sovereign immunity in certain admiralty proceedings based on specified commercial activities engaged in by vessels of the foreign state (§ 1605(b)).

In addition, the FSIA sets forth detailed procedural rules for suits against foreign states, including special rules governing venue (§ 1391(f)), jury trial (§ 1330(a)), service of process (§ 1608), answers to complaints (§ 1608), counterclaims (§ 1607), and default judgments (§ 1608(e)).

This comprehensive Congressional scheme makes it patent that the Act was intended to be the *sole* jurisdictional source for suits against foreign sovereigns.³ Moreover, its legislative history makes it

³ Since the enactment of the FSIA, six different panels of the court of appeals have uniformly held that in actions against foreign states the Act preempts all other jurisdictional statutes. *Proyecfin de Venezuela v. Banco Industrial*, 760 F.2d 390, 392 (2d Cir. 1985); *Canadian Overseas v. Compania de Acero*, 727 F.2d 274, 277 (2d Cir. 1984); *O'Connell Machinery Co. v. M.V. Americana*, 734 F.2d 115, 116 (2d Cir. 1984), *cert.denied*, 469 U.S. 1086 (1984); *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 307-09 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (2d Cir. 1982); *Ruggiero v. Compania Peruana de Vapores*, 639 F.2d 872, 873, 879 (2d Cir. 1981); *Carey v. National Oil Corp.*, 592 F.2d 673, 676 (2d Cir. 1979).

abundantly clear that the statute was expressly "*intended to preempt any other state or Federal law (excluding applicable international agreements) for according immunity to foreign sovereigns . . .*" H.R. Rep. No. 94-1487, 94th Cong., 2d Sess., 12, *reprinted in* [1976] U.S. Code Cong. & Admin. News 6604, 6610 (1975). This balance, completeness and structural integrity of the FSIA conclusively refutes the majority's conclusion that "Congress was not focusing on violations of international law when it enacted the FSIA" (App. 11a).

The majority's view (App. 12a) that because the restrictive theory of sovereign immunity—and consequently the FSIA, which codified that theory—is concerned principally with the commercial activities of foreign states, suits drawing into issue a foreign state's governmental acts are not embraced by the statute, is bottomed on an appalling misapprehension of the restrictive theory of immunity as it developed in customary international law and as it was adopted by Congress in the FSIA. As the name suggests, the restrictive theory distinguishes between "governmental" or "sovereign" activities engaged in by states (*jure imperii*) and their private law activities—activities of the kind that may also be carried on by private persons (*jure gestionis*), *Restatement of the Foreign Relations Law of the United States (Revised)* (Tent. Draft No. 2, March 1981) § 451 (adopted May 1986) ("Revised Restatement"). It is the essence of the restrictive theory to "restrict" or limit the jurisdictional immunity of foreign states to acts *jure imperii*, and to deny immunity for acts *jure gestionis*. The majority's focus on only that leg of the restrictive theory which defines the circumstances under which

states are not immune from suit to the total neglect of the other leg of the theory which *mandates* immunity constitutes an egregious error.

The majority's discrepant view is also plainly refuted by the explicit provision of § 1604 which provides in language admitting of no ambiguity that *a foreign state is immune from jurisdiction of federal and state courts*, subject only to the set of exceptions specified in §§ 1605 and 1607, and express jurisdictional provisions in treaties or international agreements to which the United States is a party which may provide a different rule. *See also* H.R. Rep.No. 94-1407, *supra*, at 17, [1975] U.S. Code Cong. & Admin. News at 6616: "Section 1604 would be the *only* basis under which a foreign state could claim immunity from the jurisdiction of any Federal or State Court in the United States" (emphasis added).

In *Verlinden B.V. v. Central Bank of Nigeria*, *supra*, this Court painstakingly reviewed the provisions of the FSIA and its legislative history and concluded that the statute "contains a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state . . ." (461 U.S. at 488, emphasis added). Elsewhere in *Verlinden*, the Court emphasized that the FSIA was "clearly intended to govern *all actions* against foreign sovereigns" (461 U.S. at 491 n.16, emphasis added).⁴

⁴ Every Circuit Court of Appeals that has addressed the issue agrees that the FSIA provides the exclusive basis for federal jurisdiction in civil actions against foreign states and their agencies. *See, City of Englewood v. Socialist People's Libyan Arab Jamahiriya*, 773 F.2d 31, 35 (3d Cir. 1985); *Williams v. Shipping Corp. of India*, 653 F.2d 875, 881 (4th Cir. 1981), *cert.*

In the words of the dissenting judge below, "it is clear from both the statutory language and the legislative history that . . . the FSIA provides the exclusive framework within which the courts of the United States are to resolve a foreign state's claim of sovereign immunity." (App. 21a).

The dissenter's conclusion that federal courts are not vested with subject-matter jurisdiction in suits against foreign states under the Alien Tort Statute is unassailable.⁵ The court of appeals erred in disre-

denied, 455 U.S. 982 (1982); *Goar v. Compania Peruana de Vapores*, 688 F.2d 417, 421 (5th Cir. 1982); *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 372 (7th Cir. 1985); *Yugoexport, Inc. v. Thai Airways Intern. Ltd.*, 749 F.2d 1373, 1375 (9th Cir. 1984), *cert. denied*, 471 U.S. 1101 (1985); *Jackson v. People's Republic of China*, 794 F.2d 1490, 1493 (11th Cir. 1986); *MacArthur Area Citizens Association v. Republic of Peru*, 809 F.2d 918, 919 (D.C. Cir. 1987).

⁵ The D.C. Circuit is the only appellate court which has addressed the question whether the FSIA preempts any arguable jurisdictional grant in the Alien Tort Statute for claims against foreign states. In *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C.Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985), the court affirmed *per curiam*, with three separate concurring opinions, a dismissal of a suit against Libya and certain Arab organizations seeking damages for a terrorist attack in Israel. While the concurring opinions differed widely as to the construction of the Alien Tort Statute in suits against non-sovereign parties, two members of the panel expressly found that suit against the state of Libya was barred by reason of the exclusive jurisdictional grant contained in the FSIA. 726 F.2d at 776 n.1 (Edwards, J.) and at 805 n.13 (Bork, J.).

See also, In Re Korean Air Lines Disaster of September 1, 1983, 597 F.Supp. 613 (D.D.C. 1984) (Alien Tort Statute does not confer competence on district courts in suits against a foreign state); *Siderman v. Republic of Argentina*, No. CV 82-1772-

garding the express provisions of § 1604 of the FSIA, the statute's legislative history and this Court's binding precedent in *Verlinden*.

The majority's view that in enacting the FSIA Congress did not evidence a clear design "to eliminate the jurisdictional grant of the Alien Tort Statute for violations of international law" (App. 12a) is patently erroneous. Its holding that the Alien Tort Statute provides a cause of action and subject matter jurisdiction where the FSIA expressly forbids it would make a nullity of the FSIA, and merits review by this Court.

B. THE COURT OF APPEALS' HOLDING THAT PERSONAL JURISDICTION OVER THE PETITIONER MAY BE ASSERTED IN THIS CASE IS IN CONFLICT WITH THE DUE PROCESS CLAUSE AND APPLICABLE DECISIONS OF THIS COURT

The majority of the panel correctly recites the fundamental constitutional principle that "a non-resident defendant must have sufficient contacts with the forum" (App. 14a) before a court of the United States can lawfully hear a claim against him. The majority, however, then engages in a sophistical analysis to reach the untenable conclusion that the petitioner has the requisite substantial contacts with the United States.⁶ The majority's personal jurisdiction analysis

RMT (C.D.Cal., March 7, 1985) (same); *contra*, *Von Dardel v. U.S.S.R.*, 623 F.Supp. 246 (D.D.C. 1985) (alternative holding).

⁶ Because of its disregard of the FSIA's provisions dealing with subject-matter jurisdiction, the majority also disregarded the Act's built-in provisions governing assertions of personal jurisdiction against foreign states. This Court succinctly sum-

begins with the observation "that certain universal offenses, like piracy and genocide are offenses against the law of nations wherever they occur. . . . The allegations here probably fall within this class of offense." (App. 14a.)⁷ This observation is irrelevant to a Due Process analysis and the majority's reliance on § 404 of the *Revised Restatement* (Tent. Draft No. 6, 1985; adopted May 1986) is wholly misplaced. That section, entitled "Universal Jurisdiction to Define and Punish Selected Offenses," treats with "Jurisdiction

marized the statutory scheme in *Verlinden*, *supra*, as follows:

Under the Act, however, both statutory subject-matter jurisdiction (otherwise known as "competence") and personal jurisdiction turn on application of the substantive provisions of the Act. Under § 1330(a), federal district courts are provided subject-matter jurisdiction if a foreign state is "not entitled to immunity either under sections 1605-1607 . . . or under any applicable international agreement"; § 1330(b) provides personal jurisdiction wherever subject-matter jurisdiction exists under subsection (a) and service of process has been made under 28 U.S.C. § 1608. Thus, *if none of the exceptions to sovereign immunity set forth in the Act applies, the District Court lacks both statutory subject-matter and personal jurisdiction.* [461 U.S. at 485 n.5, emphasis added.]

Clearly, therefore, § 1605's itemization of non-immune transactions is a prescription of "the necessary contacts which must exist before our courts can exercise personal jurisdiction." H.R. Rep. No. 94-1487, *supra*, at 13, [1975] U.S. Code Cong. & Admin. News at 6612.

⁷ It is open to doubt whether a bombing by a belligerent state of a neutral vessel in international waters, whether deliberate or accidental, is akin to piracy or genocide under international law.

to Prescribe"⁸—the capacity of a state under international law to make a rule of law.

The pivotal inquiry here is whether under the circumstances of this case a state may under international law exercise jurisdiction to adjudicate a claim of law—to assert *in personam* jurisdiction over persons or legal entities—a subject that is dealt with under the heading of "Jurisdiction to Adjudicate" in § 421 of the *Revised Restatement*⁹. The majority patently confuses the distinct concepts of jurisdiction to prescribe and jurisdiction to adjudicate.

The concept of "universal" offenses connotes that any state may prescribe substantive rules prohibiting certain conduct and that it may enforce those rules if it gets hold of the alleged offender. It has nothing to do with the state's authority to subject an alleged offender to the process of its courts. See § 401 of the *Revised Restatement*.

It is established international law that action by a state in prescribing or enforcing a rule that it does not have jurisdiction to prescribe or to enforce is a violation of international law, giving rise to the international responsibility of the state. *Restatement (Second)*, *supra*, § 8. Consistently with this international law principle, it is settled constitutional doctrine in this country that "due process requires . . . that in order to subject a defendant to a judgment in personam, if he be not present within the territory

⁸ The *Restatement (Second) of the Foreign Relations Law of the United States* § 6, comment (1965) ("Restatement (Second)"), referred to that subject as "legislative jurisdiction."

⁹ The *Restatement (Second)* referred to that subject as "jurisdiction to enforce." *Id.* at §§ 6-7.

of the forum, he has certain minimum contacts with [the forum]." *International Shoe Company v. Washington*, 326 U.S. 310, 316 (1945) (emphasis added).¹⁰ And *Hanson v. Denckla*, 357 U.S. 235 (1958), made it even more explicit that it is *the defendant's*, not the plaintiff's, contacts with the forum which are pivotal to a Due Process analysis:

The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State . . . [I]t is essential that in each case that there be some act by which the *defendant* purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.

357 U.S. at 253 (emphasis added). See also *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-72 (1985); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 298 (1980). And only last Term, in *Asahi Metal Industries Co. v. Superior Court*, ___ U.S. ___, 107 S.Ct. 1026, 1033 (1987), the Court reemphasized that, for Due Process purposes, the affiliating connection between the forum state and the nonresident defendant "must come about by an action of the defendant purposefully directed towards the forum state" (emphasis added).

The record here is barren of any affiliating contacts by the petitioner with the United States in relation

¹⁰ In enacting the FSIA, Congress expressly incorporated the Due Process principles enunciated in *International Shoe*. H.R. Rep. No. 94-1407, *supra*, at 13, [1975] U.S. Code Cong. & Admin. News at 6612.

to the claims asserted. The links which the majority finds to be constitutionally adequate do not bear scrutiny:

a) the majority's statement that the petitioner was "on notice that it might be sued here" (App. 15a) is devoid of legal or rational support. If one were to indulge in the assumption that petitioner was charged with knowledge of the intricacies of American Constitutional law and international law as applied in the United States under the rubric of "foreign relations law of the United States," the only rational conclusion one could draw is that petitioner was on notice of the *International Shoe* doctrine. Petitioner would further be chargeable with notice that Congress, in enacting the FSIA, was aware of concerns that "our courts [not be] turned into small 'international courts of claims[,] . . . open to all comers to litigate any dispute which any private party may have with a foreign state anywhere in the world.'" (Testimony of the Department of Justice's representative on the FSIA, quoted in *Verlinden B.V. v. Central Bank of Nigeria*, *supra*, 461 U.S. at 490);

b) the fact that the United States had notified the petitioner that the HERCULES would be passing the South Atlantic on neutral business (*ibid.*) is an act performed by the United States, not an action of the petitioner purposely directed at the United States;

c) the circumstance, as characterized by the majority, that the HERCULES "was plying the United States domestic trade" (App. 15a)¹¹ and that *the vessel*

¹¹ The circumstance that the HERCULES, a Liberian vessel, was on the high seas "transporting oil from one part of the

or its owner or charterer had a relationship with the United States is of no moment to a Due Process analysis. This does not establish a link *by the petitioner* with the United States;

d) petitioner's awareness of the United States' interest in protecting the freedom of the high seas (*ibid.*) hardly satisfies the *constitutional* requirement that the *acts of the petitioner* which are alleged to have caused injury to the respondents have certain minimum contacts with the United States;

e) petitioner's ability to defend a suit (*ibid.*) in the United States is plainly irrelevant to a Due Process analysis;

f) the majority's observation that if the district court here were to decline jurisdiction "substantive policies of international law will be undermined" (*ibid.*), manifestly does not furnish an affiliating link with the United States. Moreover, it is established doctrine in this country that decisions concerning foreign policy are political, not judicial in nature. *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103, 111 (1948);

g) the majority's final remark that fairness favors exercise of personal jurisdiction over the petitioner

United States to another part of the United States" (App. 15a) is of relevance to the enforcement of United States safety and environmental regulations against the vessel; see, e.g., 33 C.F.R. § 157.03(2), Coast Guard regulations defining "domestic trade." Contrary to the majority's implication, this does not mean that a foreign-flag vessel in international waters heading for an American port is within the territory of the United States, or that non-residents coming in contact with such a vessel on the high seas thereby establish a nexus with the United States.

here since respondents were denied a judicial remedy in Argentina under Argentine law (App. 15a) is, to say the least, ironic. That same court only recently affirmed the denial of a judicial remedy against the United States under United States law to a Norwegian shipowner whose vessel was damaged when it struck a mine in a Nicaraguan harbor that was alleged to have been surreptitiously mined by an agency of the United States on the basis that the suit presented non-justiciable political questions. *Chaser Shipping Corp. v. United States*, 649 F.Supp. 736 (S.D.N.Y. 1986), *aff'd*, April 27, 1987 (No. 87-6027, 2d Cir.; unpublished opinion), *cert.denied*, November 11, 1987 (56 U.S.L.W. 3453).

In sum, there is a total absence of affiliating contacts by the petitioner with the United States which would permit the assertion of *in personam* jurisdiction as a matter of constitutional law. The petitioner's lack of links of territoriality with the United States also renders the assertion of *in personam* jurisdiction over the petitioner under the circumstances of this case patently invalid as a matter of international law. *Revised Restatement, supra*, § 421. The majority's conclusion "that there is no constitutional bar to the district court's exercise of jurisdiction over Argentina here" (App. 15a) is also violative of the Fifth Amendment's Due Process Clause and disregards this Court's consistent and long-established constitutional holdings.

The Court should therefore review the unprecedented assertion of personal jurisdiction over a foreign state that has been mandated by the judgment of the court below.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

BRUNO A. RISTAU
Counsel of Record
 KAPLAN RUSSIN & VECCHI
 1215 Seventeenth Street, N.W.
 Washington, D.C. 20036
 (202) 887-0353
Attorney for the Petitioner

February 16, 1988.

APPENDIX

Appendix A

**UNITED STATES COURT OF APPEALS
For the Second Circuit**

Nos. 333, 334

August Term 1986

Argued: November 3, 1986

Last supplemental brief filed July 24, 1987

Decided: September 11, 1987

Docket Nos. 86-7602, 7603

AMERADA HESS SHIPPING CORPORATION,

Appellant,

— against —

ARGENTINE REPUBLIC,

Appellee.

UNITED CARRIERS, INC.,

Appellant,

— against —

ARGENTINE REPUBLIC,

Appellee.

FILED,
SEP 11 1987

Before: FEINBERG, Chief Judge, OAKES and
KEARSE, Circuit Judges.

Amerada Hess Shipping Corporation and United Carriers, Inc. appeal decision of United States District Court for the Southern District of New York, Robert L. Carter,

J., finding their lawsuit against Republic of Argentina for violating international law barred by the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602-1611.

Reversed and remanded. Judge Kearse dissents in a separate opinion.

DOUGLAS R. BURNETT, New York, NY (Hill, Rivkins, Carey, Loesberg, O'Brien & Mulroy, Richard H. Webber, of Counsel), for Appellant Amerada Hess Shipping Corporation; Burke & Parsons, New York, NY (Raymond J. Burke, Jr., Frances C. Peters, of Counsel), for Appellant United Carriers, Inc.

BRUNO A. RISTAU, Washington, DC (Kaplan Russin & Vecchi, Kaplan Russin Vecchi & Kirwood, New York, NY, Anthony E. Davis, of Counsel), for Appellee.

Frank L. Wiswall, Jr., Reston, VA, for The Republic of Liberia, as Amicus Curiae.

James T. Lafferty, New York, NY, for Seamen's Church Institute of New York and New Jersey, as Amicus Curiae.

Richard K. Willard, Assistant Attorney General, David Epstein, Michael J. Singer, Attorneys, Civil Division, Department of Justice, Washington, DC, Rudolph W. Giuliani, United States Attorney, New York, NY, Abraham D. Sofaer, Legal Adviser, Elizabeth Verville, Deputy Legal Advisor, Bruce C.

Rashkow, Eugene Pinkelmann, Attorneys, Department of State, Washington, DC, for the United States of America, as Amicus Curiae.

FEINBERG, Chief Judge:

This case presents the important question whether a federal district court has jurisdiction over a claim that a foreign sovereign, in violation of international law, attacked on the high seas a neutral ship engaged in the United States domestic trade. Amerada Hess Shipping Corporation (Amerada) and United Carriers, Inc. (United) appeal from a decision of the United States District Court for the Southern District of New York, Robert L. Carter, J., dismissing their complaint for lack of jurisdiction, 638 F. Supp. 73 (S.D.N.Y. 1986). Appellants argue that both the Alien Tort Statute, 28 U.S.C. § 1350, and the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§ 1330, 1602-1611, provide jurisdiction over their claims that the Republic of Argentina destroyed an oil tanker on the high seas in violation of international law. We conclude that the Alien Tort Statute does provide jurisdiction and that the FSIA does not bar it. Accordingly, we reverse and remand to the district court.

I. Background

Because the district court dismissed United's complaint for lack of jurisdiction, we must accept appellants' allegations as true. In 1977, Amerada entered a long-term time-charter agreement with United for use of the oil tanker HERCULES. Amerada used HERCULES to carry oil from Alaska, around the southern tip of South America, to its refinery in the United States Virgin Islands. This route took HERCULES near the area in the South At-

lantic where, in April 1982, an armed conflict began between Argentina and the United Kingdom that became known in this country as the Falklands War.

On May 25, 1982, HERCULES embarked from the Virgin Islands, without cargo but fully fueled, headed for Alaska. On June 3, in an effort to protect United States interest ships, the United States Maritime Administration telexed to both the United Kingdom and Argentina a list of United States flag vessels and United States interest Liberian tankers (like HERCULES) that would be traversing the South Atlantic, to ensure that these neutral vessels would not be attacked. The list included HERCULES.

By June 8, HERCULES was about 600 nautical miles off the Argentine coast and nearly 500 miles from the Falkland Islands, in international waters, well outside the "exclusion zones" declared by the warring parties. That afternoon, HERCULES was attacked without warning in three different strikes by Argentine aircraft using bombs and air-to-surface rockets.

Following these attacks, HERCULES, damaged but not destroyed, headed for safe refuge in the port of Rio de Janeiro, Brazil. Although HERCULES arrived safely in Brazil, her deck and hull had both suffered extensive damage, and a bomb that had penetrated her side remained undetonated in one of her tanks. Following an investigation by the Brazilian navy, United determined that it would be unreasonably hazardous to attempt removal of the undetonated bomb. Accordingly, on July 20, 1982, approximately 250 miles off the Brazilian coast, HERCULES was scuttled. United's loss on the sunken ship is claimed at \$10,000,000 and Amerada's loss on the fuel that went down with the ship is claimed at \$1,901,259.07.

Following a series of unsuccessful attempts to receive a hearing of their claims by the Argentine government or to retain Argentine attorneys to prosecute their claims in

the courts of that country, appellants filed their suits in the district court. The district court found that a "foreign state is subject to jurisdiction in the courts of this nation if, and only if, an FSIA exception empowers the court to hear the case." 638 F. Supp. at 75. Concluding that no FSIA exception covered these facts, the district court dismissed the suits for lack of jurisdiction. This consolidated appeal followed.

II. Violation of International Law

The facts alleged by appellants, if proven, would constitute a clear violation of international law. "The law of nations 'may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law.'" *Filartiga v. Pena-Irala*, 630 F.2d 876, 880 (2d Cir. 1980) (quoting *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160-61 (1820)). Of course, the mere fact that many or even all nations consider an act a violation of their domestic law does not suffice to create a principle of international law. *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975). "It is only where the nations of the world have demonstrated that the wrong is of mutual, and not merely several, concern, by means of express international accords, that a wrong generally recognized becomes an international law violation." *Filartiga*, 630 F.2d at 888. In this case, treaties, case law and treatises establish that Argentina's conduct, as alleged by appellants, violates settled principles of international law.

International treaties and conventions dating at least as far back as the last century recognize the right of a neutral ship to free passage on the high seas. Broad international recognition of the rights of neutrals can be found in paragraph 3 of The Declaration of Paris of 1856: "Neutral goods, with the exception of contraband of war, are not liable to capture under enemy's flag."

A more contemporary statement of the international concern and accord on this issue may be found in The Geneva Convention on the High Seas of 1958 (Convention on the High Seas), to which both Argentina and the United States were signatories. The Convention on the High Seas maps the general usage and practice of nations with regard to the rights of neutral ships in time of war. Article 22 of that treaty states that a warship encountering a foreign merchant vessel on the high seas may not board her without grounds for suspecting her of engaging in piracy, or the slave trade, or traveling under false colors. Even when there are grounds for such suspicion, the proper course is to investigate by sending an officer to inspect the ship's documents or even to board her, not to commence an attack. If such inspection fails to support the suspicions, the merchant vessel shall "be compensated for any loss or damage that may have been sustained." Article 23 of the Convention on the High Seas makes similar provisions for aircraft that have grounds to suspect a neutral vessel. Clearly, Argentina's alleged conduct in this case, bombing HERCULES and refusing compensation, violates the Convention on the High Seas. More recently, the Law of the Sea Convention of 1982 explicitly incorporated these provisions into its text. Argentina is a signatory to the Law of the Sea Convention and the United States has endorsed the relevant sections of it.

Other international accords adopted by the United States supporting a similar view of the rights of neutral ships include The London Naval Conference of 1909, the International Convention Concerning the Rights and Duties of Neutral Powers in Naval War (Hague Convention, 1907) and the Pan-American Convention Relating to Maritime Neutrality of 1928, to which Argentina was a signatory. No agreement has been called to our attention that would cast doubt on this line of authority.

As to "judicial decisions recognizing and enforcing" the rights of neutral ships on the high seas, federal courts

have long recognized in a variety of contexts that attacking a merchant ship without warning or seizing a neutral's goods on the high seas requires restitution. See, e.g., *Talbot v. Jansen*, 3 U.S. (3 Dall.) 133, 161 (1795); *The Lusitania*, 251 F. 715, 732-36 (S.D.N.Y. 1918) (dictum); cf. *The I'm Alone* (Canada v. United States), 3 U.N. Rep. Int. Arb. Awards 1609 (1933). Similarly, the academic literature on the rights of neutrals is of one voice with regard to a neutral's right of passage. See, e.g., Rappaport, "Freedom of the Seas," 2 *Encyclopedia of Amer. For. Policy* 387 (1978); *Restatement of Foreign Relations Law of the United States* (Revised) § 521 reporters' note 1, § 522 (Tent. Draft No. 6 1985).

In short, it is beyond controversy that attacking a neutral ship in international waters, without proper cause for suspicion or investigation, violates international law. Indeed, the relative paucity of cases litigating this customary rule of international law underscores the longstanding nature of this aspect of freedom of the high seas. Where the attacker has refused to compensate the neutral, such action is analogous to piracy, one of the earliest recognized violations of international law. See 4 W. Blackstone, *Commentaries* 68, 12. Argentina has cited no contrary authority. Accordingly, we turn to the jurisdictional ramifications of our holding that appellants have stated a claim of a violation of international law.

III. The Alien Tort Statute

The Alien Tort Statute, 28 U.S.C. § 1350, provides:

The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

Although seldom employed, the Alien Tort Statute means what it says. If an alien brings a suit, for a tort only, that sufficiently alleges a violation of the law of nations,

then the district court has jurisdiction. See *Filartiga*, 630 F.2d 876. All of these requirements are met in the instant case. Appellants are aliens; they are Liberian corporations. This suit is for a tort only—the bombing of a ship without justification. Also, as discussed above, the suit alleges a violation of international law.

Argentina argues, however, that the Alien Tort Statute provides jurisdiction only over individuals, not over sovereign states. It claims that the United States recognized absolute sovereign immunity in 1789, when Congress enacted the Alien Tort Statute. Therefore, Argentina contends, if Congress had intended to provide jurisdiction over sovereigns, it would have done so explicitly.

As a preliminary matter, it may be—at least as to loss of a vessel under the circumstances alleged here—that absolute sovereign immunity did not govern when the Alien Tort Statute was enacted. Rather, courts considered the immunity that was granted to be merely “a matter of grace and comity on the part of the United States.” *Verlinden v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983). It was recognized that the United States had the power to exercise jurisdiction over a foreign sovereign, if it saw fit to do so. See *The Schooner Exchange v. M’Faddon*, 11 U.S. (7 Cranch) 116, 146 (1812). Thus, for example, if a foreign sovereign seized a vessel at sea in violation of the law of nations, “the prize property which [the vessel] brings into our ports is liable to the jurisdiction of our Courts,” notwithstanding any claim of sovereign immunity. *The Santissima Trinidad*, 20 U.S. (7 Wheat.) 283, 354 (1822). See also *The Prins Frederik*, 2 Dods. 451 (1820) (English case), in which the court indicated that it would have jurisdiction over a foreign sovereign that had violated the law of salvage, if the sovereign did not make “recompense” on its own.

We need not decide, however, whether a court faced with the circumstances of this case in 1789, the year the

Alien Tort Statute was enacted, would have exercised jurisdiction over a foreign sovereign. In construing the Alien Tort Statute, “courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today.” *Filartiga*, 630 F.2d at 881. The Alien Tort Statute is no more than a jurisdictional grant based on international law. The evolving standards of international law govern who is within the statute’s jurisdictional grant as clearly as they govern what conduct creates jurisdiction. Cf. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 457 (1964) (White, J., dissenting) (under Act of State doctrine, “reasons for non-review . . . lose much of their force when the foreign act of state is shown to be a violation of international law”).

Thus, we must look to modern international law to decide whether the statute provides jurisdiction over a foreign sovereign. For example, if a current norm of international law immunized sovereigns for behavior that, if committed by an individual, would be a violation of international law, such an action by a sovereign would not be a tort “committed in violation of the law of nations.” The modern view, however, is that sovereigns are not immune from suit for their violations of international law.¹ See Paust, *Federal Jurisdiction Over Extraterritorial Acts of Terrorism and Nonimmunity for Foreign Violators of International Law under the FSIA and the Act of State Doctrine*, 23 Va. J. Int’l L. 191, 221-32 (1983); Bazylar, *Litigating the International Law of Human Rights: A “How To” Approach*, 7 Whittier L. Rev. 713, 733-34 (1985).

That international law currently denies immunity for violations of international law is not surprising, when one considers that international law consists primarily of rules guiding the conduct of nations. If sovereign acts were immunized today from scrutiny under international law,

¹ After argument, the panel requested and received supplemental briefs on this issue.

the exception would nearly swallow the rule. For example, the emerging international law prohibition of genocide, see D'Amato, *The Concept of Human Rights in International Law*, 82 Colum. L. Rev. 1110, 1127-29 (1982), would make little sense, even in theory, if sovereign states were not covered by the prohibition. Indeed, the sovereign immunity defense raised by Nazi war criminals at the Nuremberg trials was rejected by the international tribunal. International Military Tribunal (Nuremberg), *Judgment and Sentences* (1946), reprinted in 41 Am. J. Int'l L. 172, 221 (1947). ("The principle of international law, which under certain circumstances, protects the representatives of a state, cannot be applied to acts which are condemned as criminal by international law."). Since the sinking of a neutral vessel on the high seas without justification violates a substantive principle of international law, no matter who does the sinking, there is no immunity under international law in this case. We hold, therefore, that the Alien Tort Statute provides jurisdiction over Argentina.

IV. The FSIA

Argentina also contends that, regardless of whether the Alien Tort Statute would provide jurisdiction, the FSIA is now the exclusive basis for obtaining jurisdiction over foreign sovereigns. We undertake our review of the FSIA mindful of the tenet of statutory construction that "[w]here fairly possible, a United States statute is to be construed so as not to bring it into conflict with international law." Restatement of Foreign Relations Law of the United States (Revised) § 134 (Tent. Draft No. 6, 1985). See *The Charming Betsy*, 6 U.S. (2 Cranch) 137, 143 (1804). Since international law would deny immunity in these circumstances, we would construe the FSIA to grant immunity only if Congress clearly expressed such an intent.

In support of its view that the FSIA preempts the jurisdictional grant of the Alien Tort Statute, Argentina points to the apparently comprehensive language of this

court in *O'Connell Machinery Co. v. M.V. "Americana"*, 734 F.2d 115 (2d Cir.), cert. denied, 496 U.S. 1086 (1984): "The Foreign Sovereign Immunities Act insulates foreign states from the exercise of federal jurisdiction, except under the conditions specified in the Act." *Id.* at 116. The Supreme Court has expressed similar views. See *Verlinden*, 461 U.S. at 496-97 (1983). The view of the FSIA as the sole basis for United States jurisdiction over foreign sovereigns can be traced to the statute's legislative history. For example, the House Report explains that the FSIA "sets forth the sole and exclusive standards to be used in resolving questions of sovereign immunity." H.R. Rep. No. 1487, 94th Cong., 2d Sess. 12, reprinted in 1976 U.S. Code Cong. & Admin. News 6604, 6610 (House Report). This authority accurately states the general rule. As discussed below, however, Congress was not focusing on violations of international law when it enacted the FSIA. Therefore, we do not believe these pronouncements were intended to cover all violations of international law in general and actions under the Alien Tort Statute in particular.

A close examination of the legislative history of the FSIA demonstrates that Congress did not intend to remove existing remedies in United States courts for violations of international law of the kind presented here. Congress sought to achieve three major goals through the FSIA. First, it intended to incorporate into United States law the "restrictive" theory of sovereign immunity in accordance with international law (no immunity for "commercial or private" sovereign acts). Second, it sought to make certain that the judicial rather than the executive branch would apply the law, so "that these often crucial decisions are made on purely legal grounds and under procedures that insure due process." House Report at 6606. Third, it hoped to eliminate many of the procedural problems that suits against foreign sovereigns create (e.g. service of process, execution of judgment) by providing comprehensive rules for these aspects of a suit. See House

Report at 6605-06. None of these goals suggests that Congress intended to eliminate the jurisdictional grant of the Alien Tort Statute for violations of international law.

The FSIA's focus on commercial concerns pervades the entire statute. The impetus for the enactment of the FSIA was Congress' awareness that the increased commercial interaction of foreign states with United States citizens "call[s] into question whether our citizens will have access to the courts in order to resolve ordinary legal disputes." House Report at 6605. Thus, the act adopted a theory of immunity whose focus is limited to commercial situations, and the non-consensual exceptions to sovereign immunity that it supplies are almost exclusively restricted to commercial activities as well. (The one major exception is section 1605(a)(5), which deals with private torts). International law violations are simply not discussed in the statute or the legislative history outside of the commercial context. Thus, international law violations were not the focus of the "comprehensive" language of the drafters of the FSIA any more than they were the focus of the Supreme Court in the *Verlinden* case, 461 U.S. 480. We would consider it odd to hold that, by enacting a statute designed to narrow the scope of sovereign immunity in the commercial context, Congress, though silent on the subject, intended to broaden the scope of sovereign immunity for violations of international law.

The other goals of the FSIA, to place immunity decisions firmly in the courts, and to codify procedures for suits against sovereigns, do not suggest an intent to provide immunity for violations of international law outside of the commercial context. Prior to the FSIA, a foreign sovereign would frequently obtain immunity by seeking the intervention of the United States State Department. This left the State Department in an awkward position and parties dealing with foreign governments in an uncertain one. *Id.* at 6607. At the same time, the United States found that "[i]n virtually every country . . . sovereign im-

munity is a question of international law to be determined by the courts." *Id.* at 6608. Requests by the United States for immunity in foreign courts frequently failed. *Id.* at 6607. Accordingly, through the FSIA, Congress made immunity decisions the exclusive province of the courts. This provided certainty to parties coming into contact with foreign sovereigns and brought United States practice into conformity with the immunity practices of most other nations. The elimination of the executive branch's role in making immunity decisions certainly does not suggest an intent to provide immunity for violations of international law. Similarly, the procedural goals of the FSIA in no way require an implicit repeal of the jurisdictional grant of the Alien Tort Act; these procedural rules would simply apply to a suit under that statute as well.

Not only is the legislative history of the FSIA devoid of any indication that Congress intended the FSIA to bar jurisdiction under the unusual circumstances of this case, a suit under the Alien Tort Act for a violation of international law, but, in our view, construing the FSIA to require that result would actually frustrate Congress' purpose. The "central premise" of the FSIA was that "decisions on claims by foreign states to sovereign immunity are best made by the judiciary on the basis of a statutory regime which *incorporates standards recognized under international law.*" House Report at 6613 (emphasis added). Thus, although Congress did not focus on suits for violations of international law, it clearly expected courts to apply the international law of sovereign immunity. As we have seen, under international law, Argentina would not be granted sovereign immunity in this case. Therefore, a grant of immunity here would fly in the face of this central premise. Since Congress did not express a clear intent to contradict the immunity rules of international law, and, indeed, left the Alien Tort Statute in force, we conclude that the FSIA does not preempt the jurisdictional grant of the Alien Tort Statute.

V. Personal Jurisdiction

Of course, even given the jurisdictional grant of the Alien Tort Statute, the district court must have constitutionally satisfactory personal jurisdiction over the defendant. *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 313 (2d Cir. 1981), cert. denied, 454 U.S. 1148 (1982). Under *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945), a nonresident defendant must have sufficient contacts with the forum, so that the exercise of jurisdiction will not offend notions of fair play and substantial justice. In the international context, the "forum" that the contacts must relate to is the United States itself. See *Texas Trading & Milling Corp.*, 647 F.2d at 314. Thus, we must examine the extent:

to which defendants availed themselves of the privileges of American law, the extent to which litigation in the United States would be foreseeable to them, the inconvenience to defendants of litigating in the United States, and the countervailing interest of the United States in hearing the suit.

Id. (citations omitted). See Kane, *Suing Foreign Sovereigns: A Procedural Compass*, 34 *Stan. L. Rev.* 385, 404-407 (1982).

In this case, we find that the constitutional requirements for personal jurisdiction are satisfied. We note at the outset that certain universal offenses, like piracy and genocide are offenses against the law of nations wherever they occur. See *Restatement of Foreign Relations Law of the United States (Revised)* § 404 (Tent. Draft No. 6, 1985). The allegations here probably fall within this class of offense. Since, under international law, a state may punish these offenses even when they occur outside the state's territory, it has been argued that such occurrences always have sufficient "effects" within the United States to satisfy due process. See Paust, *Draft Brief Concerning Claims*

to Sovereign Immunity and Human Rights: Nonimmunity for Violations of International Law under the FSIA, 8 *Hous. J. of Int'l L.* 49, 69-70 (1985).

We need not decide that question in this case, however, since the actions alleged here are sufficiently related to the United States for Argentina to have been on notice that it might be sued here. Argentina was specifically notified by the United States that *HERCULES* would be passing through the South Atlantic on neutral business, clearly revealing to Argentina a United States interest in the ship and its safety. Furthermore, *HERCULES* was plying the United States domestic trade, transporting oil from one part of the United States to another part of the United States pursuant to a contract that called for payment in the United States. Of course Argentina was also aware of the obvious United States interest in protecting the freedom of the high seas.

Argentina, as a member of the community of nations, has naturally benefited from the freedom of the seas guaranteed by international law and the law of the United States. Obviously, Argentina has ready means to defend the suit here, and, if the United States declines to exercise personal jurisdiction, the substantive policies of the international law involved will be undermined. Considerations of fairness also weigh in favor of exercising jurisdiction since appellants have sought redress of their grievances in Argentina and were unable to obtain even a hearing. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980). Accordingly, we find that there is no constitutional bar to the district court's exercise of personal jurisdiction over Argentina here.

VI. Conclusion

Our holding today is a narrow one. The FSIA is the sole source from which a foreign sovereign may obtain immunity and, ordinarily, it is the only basis on which a

court can exercise jurisdiction over a foreign sovereign. However, where an alien sues a foreign sovereign for a violation of international law, Congress has provided subject matter jurisdiction under the Alien Tort Statute. We realize that the question of the effect of these two statutes enacted by Congress is a difficult one.² We are heartened by the knowledge that, if we are mistaken, there is no bar to a statutory remedy. It should also be noted that the burden on a plaintiff moving under the Alien Tort Statute remains great. The class of actions that are recognized as international law violations, as distinguished from a mere tort, is quite small. Moreover, the sovereign defendant or its action must have sufficient contacts to satisfy the constitutional requirements of personal jurisdiction. And finally, the procedural requirements of the FSIA, restricting execution of judgment for example, see *Letelier v. Republic of Chile*, 748 F.2d 790 (2d Cir. 1984), cert. denied, 471 U.S. 1125 (1985) would still have to be considered. See Kane, *Suing Foreign Sovereigns: A Procedural Compass*, 34 Stan. L. Rev. 385, 392-93 (1985).

² Other district courts that have directly considered these questions have reached varying conclusions. See *Von Dardel v. Union of Soviet socialist Republics*, 623 F. Supp. 246 (D.D.C. 1985) (finding jurisdiction); *In re Korean Airlines Disaster of September 1, 1983*, MDL No. 565, Misc. No. 83-0345 (D.D.C. Aug. 2, 1985) (finding no jurisdiction); *Sideman v. The Republic of Argentina*, (CV82-1772-RMT MCX) (C.D. Cal. March 7, 1985) (finding no jurisdiction). We are informed that further proceedings are pending in *Von Dardel* and *Sideman*. Cf. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), cert. denied, 470 U.S. 1003 (1985).

The judgment of the district court is reversed and the case is remanded for further proceedings.³

³ Appellants also argue that jurisdiction exists here under § 1605(a)(5) of the FSIA on the grounds that sinking a ship on the high seas is a tort "within the United States" and that disruption of contractual payments due in New York is an "injury occurring in the United States." See *Texas Trading & Milling Corp.*, 647 F.2d at 312. In view of our disposition of this case, we need not consider these issues. We do note, however, that these arguments are not inconsistent with our holding, since a court could find jurisdiction for a tort under the FSIA, without deciding whether the tort is a violation of international law.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

UNITED CARRIERS, INC. & AMERADA HESS

Nos. 86-7602-7603

KEARSE, *Circuit Judge*, dissenting:

I respectfully dissent from the majority's conclusion that the district court has subject matter jurisdiction over the present suit to recover money damages from defendant Argentine Republic ("Argentina") for its bombing of a Liberian tanker in international waters some 600 miles from the Argentine coast. In my view, the majority has disregarded a clear Congressional intention to deny United States courts jurisdiction over such matters where, as here, the foreign state asserts a defense of sovereign immunity.

The majority holds that Argentina is not entitled to recognition of its claim of sovereign immunity, and thereby to have the case dismissed for lack of jurisdiction, because the Alien Tort Statute, codified at 28 U.S.C. § 1350 (1982), provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort . . . committed in violation of the law of nations. . . ." The majority views this provision as "no more than a jurisdictional grant based on international law," and rules that the scope of the grant depends on "[t]he evolving standards of international law." *Ante* at [10]. I disagree.

At the outset, it should be recognized that though substantive international law is part of the common law of the United States, see *Filartiga v. Pena-Irala*, 630 F.2d 876, 887 (2d Cir. 1980), federal court subject-matter jurisdiction is not a matter of common law. Such jurisdiction exists only to the extent that Congress has bestowed it,

"in the exact degrees and character which to Congress may seem proper for the public good." *Cary V. Curtis*, 44 U.S. (3 How.) 236, 245 (1845) (footnote omitted); *Sheldon v. Sill*, 49 U.S. (8 How.) 441 (1850). Thus, even assuming that when Congress passed the Alien Tort Statute in 1789 it intended to allow federal subject-matter jurisdiction to ebb and flow with the vicissitudes of "evolving standards of international law," a premise of which I am skeptical, I cannot see how we can properly disregard the clearly restrictive provisions of the Foreign sovereign Immunities Act ("FSIA") passed in 1976, codified at 28 U.S.C. §§ 1330, 1602-1611 (1982), which were "intended to preempt any other State or Federal law (excluding applicable international agreements) for according immunity to foreign sovereigns." H.R. Rep. No. 1487, 94th Cong., 2d Sess. ("House Report"), reprinted in 1976 U.S. Code Cong. & Admin. News ("USCCAN") 6604, 6610.

Section 1602 of The FSIA provides that "[c]laims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter [i.e., 28 U.S.C. §§ 1602-1611]." To me, the plain language of this provision means that the FSIA established the exclusive framework within which the courts of the United States were, from 1976 onward, to rule on foreign states' claims of sovereign immunity.

If further clarification be required, the legislative history of the FSIA is replete with it. For example, the Report of the House of Representatives Judiciary Committee, in addition to stating that the FSIA was intended to preempt any other law with regard to foreign sovereign immunity, stated that the FSIA "sets forth the *sole and exclusive standards* to be used in resolving questions of sovereign immunity raised by foreign states before Federal and State courts in the United States." House Report 1976 USCCAN at 6610 (emphasis added). See also *id.* at 6604 (FSIA's purpose was "to define the jurisdiction of United States

courts in suits against foreign states [and] the circumstances in which foreign states are immune from suit"); *id.* (FSIA was designed "to provide when a foreign state is entitled to sovereign immunity"); *id.* at 6613 (FSIA "sets forth the legal standards under which Federal and State courts would henceforth determine all claims of sovereign immunity raised by foreign states"); *id.* at 6610 ("setting forth comprehensive rules governing sovereign immunity, the [FSIA] bill prescribes: the jurisdiction of U.S. district courts in cases involving foreign states . . ."); *id.* at 6611 (the bill added 28 U.S.C. § 1330, which "provides a comprehensive jurisdictional scheme in cases involving foreign states").

It is hardly surprising, therefore, that the United States Supreme Court has noted that the FSIA "contains a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 488 (1983) ("*Verlinden*").

Looking to the substantive provisions of the FSIA, I see no basis for denying Argentina's claim of sovereign immunity in the present case. Section 1604 states, in pertinent part, that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter." 28 U.S.C. § 1604. Thus, the FSIA "starts from a premise of immunity and then creates exceptions to the general principle." House Report, 1976 USCCAN at 6616. "[I]f the claim does not fall within one of the exceptions, federal courts lack subject-matter jurisdiction." *Verlinden*, 461 U.S. at 489 (footnote omitted). The exceptions created in §§ 1605-1607 center principally on the foreign state's conduct of commercial activities, plainly not at issue in the present case, and on noncommercial torts committed within the United States (*see* House Report, 1976 USCCAN at 6619: "the tortious act or omission must

occur within the jurisdiction of the United States . . ."), a condition also plainly not met here.

Finally, it is evident that in enacting the FSIA, Congress did consider and make provision with respect to claims of alleged violations of international law. Thus, the House Report noted that in only "two categories of cases [would § 1605(a)(3)] deny immunity where 'rights in property taken in violation of international law are in issue.'" House Report, 1976 USCCAN at 6618. The two categories involve cases where the property (or property exchanged for it) either (a) is present in the United States, or (b) is owned or operated by the foreign state claiming immunity. 28 U.S.C. § 1605(a)(3). Neither circumstance is present here.

In sum, I believe it clear from both the statutory language and the legislative history that (1) the FSIA provides the exclusive framework within which the courts of the United States are to resolve a foreign state's claim of sovereign immunity, and (2) within that framework, recognition of such immunity is to be the rule, subject only to such exceptions as are expressly provided in the statute. Since the FSIA does not set forth any exception denying immunity in a case such as the present one, I would affirm the judgment of the district court dismissing this action.

APPENDIX B
UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

Docket Nos. 86-7602, 7603

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Court-house in the City of New York, on the

eleventh day of September
one thousand nine hundred and eighty-seven.

Present:

Hon. WILFRED PEINBERG, Chief Judge,
Hon. JAMES L. OAKES,
Hon. AMALYA L. KEARSE,

Circuit Judges,

AMERADA HESS SHIPPING CORPORATION,

Appellant,

—against—

ARGENTINE REPUBLIC,

Appellee.

UNITED CARRIERS, INC.,

Appellant,

—against—

ARGENTINE REPUBLIC,

Appellee.

FILED
SEP 11 1987

Appeal from the United States District Court for the
Southern District of New York

This cause came on to be heard on the transcript of record from the United States district Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered adjudged and decreed that the judgment of said District Court be and it hereby is reversed and the action be and it hereby is remanded to the said district court for further proceedings in accordance with the opinion of this court with costs to be taxed against the appellee.

ELAINE B. GOLDSMITH,
Clerk

By: Edward J. Guardaro,
Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Docket No. 86-7602

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 18th day of November one thousand nine hundred and eighty-seven.

UNITED CARRIERS, INC. AND AMERADA HESS SHIPPING CORPORATION,

Plaintiffs-Appellants,

-V-

ARGENTINE REPUBLIC,

Defendant-Appellee.

FILED
NOV 18 1987

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Appellee-ARGENTINE REPUBLIC.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

Elaine B. Goldsmith
Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMERADA HESS SHIPPING CORPORATION,

Plaintiff,

OPINION

—against—

ARGENTINE REPUBLIC,

85 Civ. 4365 (RLC)

Defendant.

UNITED CARRIERS, INC.,

Plaintiff,

—against—

85 Civ. 4378 (RLC)

ARGENTINE REPUBLIC,

Defendant.

APPEARANCES

HILL, RIVKINS, CAREY, LOESBERG, OBRIEN & MULROY

Attorneys for Plaintiff

Amerada Hess Shipping Corporation

21 West Street

New York, N.Y. 10006

RICHARD H. WEBBER

DOUGLAS R. BURNETT

Of Counsel

BURKE & PARSONS

Attorneys for Plaintiff

United Carriers, Inc.

1114 Avenue of the Americas

New York, N.Y. 10036

RAYMOND J. BURKE, JR.
FRANCIS C. PETERS

Of Counsel

KAPLAN RUSSIN & VECCHI
Attorneys for Defendant
Republic of Argentina
1218 16th Street, N.W.
Washington, D.C. 20036

BRUNO A. RISTAU

Of Counsel

KAPLAN RUSSIN VECCHI & KIRKWOOD
Attorneys for Defendant
Republic of Argentina
28 West 44th Street
New York, New York 10036

JEANNE FERRIS SIEGEL

Of Counsel

CARTER, District Judge

The Argentine Republic, defendant in these two related actions, has moved to dismiss both of the complaints for lack of subject-matter jurisdiction by virtue of the Foreign Sovereign Immunities Act ("FSIA"), Pub.L. No. 94-583, 90 Stat. 2891, codified at 28 U.S.C. §§ 1330, 1332(a)(2)-(4), 1391(f), 1441(d) and 1602-1611.

Plaintiff United Carriers, Inc. ("United Carriers"), a Liberian corporation, owned the Hercules, a crude oil tanker. Plaintiff Amerada Hess Shipping Corporation ("Amerada Hess"), also a Liberian corporation, time-chartered the vessel to transport Alaskan North Slope crude oil from Valdez, Alaska to a Hess oil refinery in the Virgin

Islands. Because her width precluded passage through the locks of the Panama Canal, the Hercules sailed between these two points by travelling around the southern tip of South America at Cape Horn.

On April 2, 1982, the Argentine Republic invaded the islands known as the Falklands to the English-speaking world, and as the Malvinas to the Spanish-speaking. Great Britain defended its crown colony off of the eastern coast of Argentina, and war between the two nations ensued. Throughout that war, Liberia remained a neutral nation. The Hercules, however, could not remain wholly disengaged from the post-colonial struggle raging in the South Atlantic. On May 5, while voyaging from Valdez to St. Croix, she diverted her course upon the request of the Argentine Navy in order to search for survivors of the General Belgado, an Argentine Navy cruiser sunk by a British submarine. She was later released from this task and completed her voyage to St. Croix.

On May 25, 1982, the Hercules began its return voyage in ballast, or without cargo, to Valdez. Without provocation or warning, Argentine military aircraft began to bomb the neutral merchant vessel three separate times on June 8: once at 1350 Greenwich Mean Time ("G.M.T."), when she was located at 46 degrees 10 minutes South latitude, 49 degrees 30 minutes West longitude; at 1430 G.M.T. when she was at 45 degrees 16 minutes South latitude, 48 degrees 27 minutes West longitude; and at 1625 G.M.T. when she was at 46 degrees 8 minutes South latitude, 48 degrees 55 minutes West longitude. Unaccountably, a belated directive to change course or suffer attack was received by the Hercules after the third attack, between 1720 and 1800 G.M.T. The complaints allege that the air attacks took place outside of the war zones designated by both the Argentine Republic and Great Britain. The bombing and rocket attacks damaged the decks and hull of the Hercules and left her with an undetonated bomb lodged in her starboard side. Thus disabled, she reversed course and sailed

towards Rio de Janeiro, Brazil, the nearest safe port of refuge. United Carriers decided that it would be too dangerous to attempt to remove the undetonated bomb and repair the Hercules. The tanker was scuttled 250 nautical miles off of the Brazilian coast.

Amerada Hess alleges that it has been unable to engage Argentine lawyers to pursue a claim for its losses in the Argentine Republic's courts. It attributes this failure to "the politically charged nature of the claim and knowledge that the claim is opposed by the Argentine Government." Verified Complaint of Amerada Hess, ¶ 44. Affidavits submitted in opposition to the motion to dismiss show that the attorneys for Amerada Hess have corresponded with two Argentinian lawyers who refused to press its claims in the Argentine courts. Amerada Hess and United Carriers seek to obtain relief from this court, alleging jurisdiction pursuant to the Alien Tort Act, 28 U.S.C. § 1350. Amerada Hess also alleges jurisdiction "according to the principle of universal jurisdiction, recognized in customary international law." Verified Complaint of Amerada Hess, ¶ 5.

DISCUSSION

Foreign sovereign immunity has a venerable history in this country's courts, dating back at least to Justice Marshall's decision in *The Schooner Exchange*, 11 U.S. (7 Cranch) 74 (1812). The doctrine developed over the next century and a half in a world of broadened state activity and burgeoning international trade. By the middle of this century, two aspects of foreign sovereign immunity that deserve mention had evolved. The first was substantive: the doctrine of "restrictive" immunity, which accords a foreign sovereign immunity for its public acts (*jure imperii*) but not for its commercial, or quasi-private, activities. The second was procedural: usually, but not always, foreign nations would seek immunity from the State Department, which would submit "suggestions of immunity"

to the courts where it determined that immunity was appropriate. See *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 487-88 (1983). Political pressures exerted by foreign nations not infrequently affected the State Department's determination, *id.*, leading to lack of uniformity and clarity in the doctrine. In 1976, Congress sought to codify the restrictive doctrine of foreign sovereign immunity and to place responsibility for making determinations of immunity squarely within the judiciary. H.Rep. No. 94-1487, 94th Cong., 2d Sess. 6-7 (1976), reprinted at 1976 U.S. Code Cong. & Ad. News 6604, 6605. Congress was emphatic that the FSIA be the sole means of assessing claims of immunity. That interest is apparent from the structure of the FSIA, which unequivocally states that:

Subject to existing international agreements to which the United States is a party at the time of the enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

28 U.S.C. § 1604. A foreign state is subject to jurisdiction in the courts of this nation if, and only if, an FSIA exception empowers the court to hear the case. The legislative history strengthens this reading. The House report states that the FSIA "sets forth the sole and exclusive standards to be used in resolving questions of sovereign immunity raised by foreign states before Federal and State courts in the United States. It is intended to preempt any other State or Federal law (excluding applicable international agreements) for according immunity to foreign sovereigns, their political subdivisions, their agencies, and their instrumentalities." H.Rep. No. 94-1487 at 12; 1976 U.S. Code Cong. & Ad. News at 6610. Almost without exception, courts interpreting the FSIA have assumed that the FSIA is the exclusive source of jurisdiction over foreign sovereigns, *Frolova v. U.S.S.R.*, 761 F.2d 370 (7th Cir. 1985) (*per curiam*), even in the context of other jurisdic-

tional grants. *O'Connell Machinery Co. v. M.V. Americana*, 734 F.2d 115 (2d Cir.), cert. denied, ___ U.S. ___, 105 S.Ct. 591 (1984) (admiralty); *Ruggiero v. Compania Peruana de Vapores "Inca Capac Yuparqui"*, 639 F.2d 872 (2d Cir. 1981) (diversity); *In Re Korean Air Lines Disaster of September 1, 1983*, Misc. No. 83-0345 (D.D.C. September 1, 1985) (Alien Tort Act); *Siderman v. Republic of Argentina*, No. CV 82-1772-RMT(MCx) (C.D.Cal. March 7, 1985) (Alien Tort Act). But see *Von Dardel v. U.S.S.R.*, 623 F. Supp. 246 (D.D.C. 1985) (FSIA does not effect *pro tanto* repeal of Alien Tort Act jurisdiction).

Plaintiffs' claims undeniably fall outside of the exceptions to blanket foreign sovereign immunity provided by the FSIA. The only provision for tort claims, where the foreign sovereign has not waived immunity, requires that the "damage to or loss of property" occur "in the United States."¹ Interpretation of similar language in terms of the commercial activity exception in § 1605(a)(2) has been breathtakingly broad. See *Crimson Semiconductor, Inc. v. Electronum*, 629 F. Supp. 903 (S.D.N.Y. 1986) (Carter, J.). Yet even that breadth is of no avail to these Liberian plaintiffs, who can claim no loss whatsoever occurring in the United States. In addition, one Court of Appeals has

¹ 28 U.S.C. § 1605(a)(5). That subsection denies a foreign state immunity where:

money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while action within the scope of his office or employment; except that this paragraph shall not apply to—

- (A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or
- (B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

interpreted the legislative history of § 1605(a)(5) to require that the tortious act or omission itself occur in the United States. *Frolova v. U.S.S.R.*, *supra*, 761 F.2d at 379. While we need not adopt that reasoning, we note that it is further evidence that the facts underlying this case are well beyond the purview of the § 1605(a)(5) exception.

Plaintiffs argue that the Alien Tort Act provides the basis for jurisdiction that the FSIA denies. That statute gives the district courts "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. In their view, when the First Congress adopted the Judiciary Act of 1789—of which the Alien Tort Act is a part—it intended to confer jurisdiction over suits such as the instant case to federal district courts. Neither the FSIA itself nor its legislative history mentions the Alien Tort Act. Since repeal by implication is disfavored, the cause of action created by the Alien Tort Act survives the passage of the FSIA.

Both the premises and the conclusion of this inventive argument must be rejected. First, we do not credit plaintiffs' contention that the Argentine Republic would not have enjoyed foreign sovereign immunity in an action such as this in 1789. Second, even if we accept plaintiffs' version of legal history, the language of the Alien Tort Act is silent as to foreign sovereign immunity. Therefore, the FSIA does not repeal the Alien Tort Act any more than it repeals any other jurisdictional act that by its terms may include actions brought against foreign sovereigns.

No case law supports the assertion that a foreign sovereign state would not have enjoyed immunity in 1789. As evidence of their contention that a foreign sovereign would not be immune in the minds of the drafters of the Alien Tort Act, plaintiffs cite the fact that a sovereign would not enjoy sovereign immunity in its own prize courts. Nanda Affidavit at 5, Plaintiffs' Joint Exhibit 12. By anal-

ogy, they suggest, a foreign sovereign would not enjoy immunity in another nation's municipal courts. Contemporary legal theory recognizes that foreign sovereign immunity, based on comity, is a very different matter from the sovereign immunity accorded the state in its own courts, based on separation of powers. The analogy would fail today; there is no reason to assume that it would have succeeded in 1789. Moreover, if we are to adopt the iconoclastic view that the Alien Tort Act preserves the vulnerability to suit of foreign sovereigns extant at its passage, we need evidence more forceful than a hypothetical argument by analogy. Plaintiffs also base their historical argument on two scholarly pieces, G. Badr, *State Immunity: An Analytical and Prognostic View* (1984) and S. Sucharitkul, *State Immunities and Trading Activities in International Law* (1959), that discover the origin of nation-state—as opposed to personal—foreign sovereign immunity in *The Schooner Exchange*, decided in 1812. That inaccurate contention can quickly be disproven by recourse to early court reports. *Nathan v. Virginia*, 1 Dall. (Pa.) 77 (1781) granted the state of Virginia foreign sovereign immunity in Pennsylvania's courts.

Even if foreign sovereign immunity would have been extended to a nation under the circumstances of this case in 1789, the FSIA's grant of immunity is not a repeal of the Alien Tort Act. The Alien Tort Act speaks in terms of plaintiffs and causes of action. It is utterly silent as to classes of defendants. We may assume, without recourse to legal history, that a foreign sovereign could be sued under the Alien Tort Act if one were to regard the statute in isolation. Yet the FSIA does not repeal the Alien Tort Act because it narrows the class of defendants. It does the same to many of the jurisdictional statutes in the United States Code. The FSIA could only be said to repeal the Alien Tort Act if the statute covered *only* claims against foreign sovereigns, an argument that the plaintiffs do not, because they cannot, make. Thus, it is irrelevant

that repeal by implication is disfavored. The FSIA effects no repeal.

Plaintiffs next argue that foreign sovereign immunity is not absolute or requisite, and that the Argentine Republic's refusal to repay the plaintiffs is so manifest a violation of its obligation under international law that this country has a right to refuse it immunity. Let us assume that this argument is valid as a matter of international law. Nonetheless, that fact does not empower this court to create an *ad hoc* exception to a Congressional statute in order to hear this case. Federal courts, it bears mentioning at this juncture, are courts of limited jurisdiction. Perhaps Congress could empower federal courts to hear cases such as this; the court, however, is constrained by Congress's failure to do so.

Two district courts have already rejected arguments that the Alien Tort Act creates an implied exception to the FSIA. *Siderman*, *supra*; *Korean Air Lines*, *supra*. In *Siderman*, the court dismissed an action brought against Argentina and one of its provinces for torture and the taking of property by the former military regime. The court reviewed the legal history of foreign sovereign immunity and concluded that the Alien Tort Act “does not provide an exemption to foreign sovereign immunity. . . .” *Siderman*, slip op. at 3. In *Korean Air Lines*, the court dismissed wrongful death claims brought against the Soviet Union for deaths resulting when a commercial airplane that had strayed into Soviet territory was shot down. Although the court relied on both the FSIA and the act of state doctrine,² it clearly found that the Alien Tort Act did not carve out an exception to the FSIA's requirements. “[T]o

² The act of state doctrine “precludes the courts of this country from inquiring into the validity of the public acts of a recognized foreign sovereign power committed within its own territory.” *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964). It is a judge-made prudential doctrine.

hold that the Alien Tort Claims Act gives a cause of action and subject matter jurisdiction where the FSIA forbids it would make a nullity of the Foreign Sovereign Immunities Act." *Korean Air Lines*, slip op. at 11.

Both *Siderman* and *Korean Air Lines* dismissed claims against foreign sovereigns for actions occurring within the foreign sovereign's territory. Yet that fact, relevant to application of the act of state doctrine, is not relevant to the question of foreign sovereign immunity at issue here. In *Siderman*, *Korean Air Lines*, and the instant case, a violation of the law of nations is alleged. Where the tort is committed outside of the United States, the effect of FSIA on the court's jurisdiction does not vary with the *locus delicti*. In addition, the Court of Appeals for the District of Columbia has assumed, albeit in dicta, that the standards of the FSIA apply to actions brought pursuant to the Alien Tort Act where the alleged tort has occurred outside of the foreign sovereign's territory. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 776 n.1 & 805 n.13 (D.C.Cir. 1984), *cert. denied*, ___ U.S. ___, 105 S.Ct. 1354 (1985) (separate concurrences of Edwards, J. and Bork, J.).

The court has addressed plaintiffs' arguments in greater detail than they merit, given the clarity of the FSIA's language and the precedents that support this result. Such attention is warranted only because similar arguments have been accepted—incorrectly, we feel—in *Von Dardel v. U.S.S.R.*, 623 F. Supp. 246 (D.D.C. 1985). In *Von Dardel*, the court entered a default judgment against the Soviet Union in an action brought against it for the "unlawful seizure, imprisonment and possibly death" of Raoul Wallenberg, the heroic Swedish diplomat. In addition to waiver arguments inapplicable here, the court found that it had jurisdiction because the FSIA should not be read "to extend immunity to clear violations of universally recognized principles of international law." *Von Dardel*, 623 F. Supp. at 254. It based this interpretation on language in FSIA's

legislative history stating that the statute incorporated standards of international law. *Id.* at 253. Nothing in the FSIA or its legislative history supports that interpretation. The language cited by the *Von Dardel* court, H.Rep. No. 94-1487 at 14, 1976 U.S. Code Cong. & Ad. News at 6613, says merely that Congress sought to adopt internationally accepted standards of foreign sovereign immunity, not that immunity would be waived for violations of international law.

Finally, we note that the principle of universal jurisdiction cited by Amerada Hess in its complaint does not provide a basis for jurisdiction in a civil case. That doctrine only provides for criminal jurisdiction. See Restatement (2d) Foreign Relations Law of the United States §404 (Tent. Draft No. 2, 1981).

For all of these reasons, defendants' motions must be granted. Both complaints in these actions are dismissed.

IT IS SO ORDERED.

Dated: New York, New York

May 5, 1986

ROBERT L. CARTER
U.S.D.J.

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

85 Civ. 4365 (RLC)

AMERADA HESS SHIPPING CORPORATION,
Plaintiff,

—against—

ARGENTINE REPUBLIC,
*Defendant.*NOTICE OF SUIT
AND SERVICE OF
JUDICIAL DOCUMENTS

S I R:

PLEASE TAKE NOTICE That the above-captioned action has been commenced by United Carriers, Inc., [sic] against the Argentine Republic in the United States District Court for the Southern District of New York under Civil Action Number 85-4365. The following information is supplied without prejudice to plaintiff's position that this action arises under 28 U.S.C. 21350 [sic] (1982):

NOTICE OF SUIT

1. Title of legal proceeding: *Amerada Hess Shipping Corporation v. Argentine Republic*. Full name of Court: United States District Court for the Southern District of New York. Case Number: 85 Civ. 4365(RLC)
2. Name of foreign state concerned: Argentine Republic.

3. Identity of the other parties: United Carriers, Inc. has submitted a request to the Court that this case be treated as "related" to an action already pending before the Court which arises out of the same incident, namely *United Carriers, Inc. v. Argentine Republic*, 85 Civ. 4378 (RLC).

4. Nature of documents served:

Summons and Complaint.

5. Nature and purpose of the proceedings: Amerada Hess Shipping Corporation, Charterer of S/T HERCULES, brings suit for losses suffered as a result of bombing attacks by the Argentine armed forces on S/T HERCULES on or about June 8, 1982. The unprovoked attacks, without warning, on S/T HERCULES were in violation of the law of nations and of the laws of the United States, in that they were committed against the unarmed merchant vessel of a neutral country in innocent passage upon the high seas. As a direct result of the attacks, S/T HERCULES was caused to be scuttled on or about July 20, 1982. Damages are claimed in the amount of \$1,901,259.07 plus interest.

6. Date of default judgment: Not applicable. A response to a "Summons" and "Complaint" is required to be submitted to the Court not later than thirty (30) days after these documents are received by you. The response may present jurisdictional defenses (including defenses relating to state immunity).

8. The failure to submit a timely response with the Court can result in a Default Judgment and a request for execution to satisfy the judgment. If a Default Judgment has been entered, a procedure may be available to vacate or open that judgment.

22 C.F.R. §93.2 (1984) recites the following paragraph for inclusion in a Notice of Suit:

9. Questions relating to state immunities and to the jurisdiction of United States courts over foreign states are governed by the Foreign Sovereign Immunities Act of 1976, which appears in sections 1330, 1391(f), 1441(d), and 1602 through 1611, of Title 28, United States Code (Pub. L. 94-583; 90 Stat. 2891).

It is the position of plaintiff Amerada Hess Shipping Corporation, however, that the Foreign Sovereign Immunities Act of 1976 is inapplicable to the action described herein, which arises under the Alien Tort Claims Act, 28 U.S.C. §1350 (1982). The text of the Alien Tort claims Act is as follows:

§1350. Alien's Action for Tort.

The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

Dated: New York, New York
June 24, 1985.

HILL RIVKINS CAREY LOESBERG O'BRIEN
& MULROY
(Attorneys for Plaintiff)

By: _____
A Member of the Firm

Office and Post Office Address
21 West Street - 21st Floor
New York, New York 10006
(212) 825-1000

To: LIC. Dante Caputo
Minister of Foreign Affairs
Ministry of Foreign Affairs
Reconquista 1088
Buenos Aires, 1003,
Argentina

APPENDIX F

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

85 CIV 4378/(RLC)

UNITED CARRIERS, INC.,

Plaintiff,

—against—

ARGENTINE REPUBLIC,

Defendant.

NOTICE OF SUIT AND SERVICE OF JUDICIAL DOCUMENTS

S I R:

PLEASE TAKE NOTICE that the above-captioned action has been commenced by United Carriers, Inc., against the Argentine Republic in the United States District Court for the Southern District of New York under Civil Action Number 85 CIV 4378. The following information is supplied without prejudice to plaintiff's position that this action arises under 28 U.S.C. §1350 (1982):

NOTICE OF SUIT

1. Title of legal proceeding: *United Carriers, Inc. v. Argentine Republic.*
Full name of court: United States District Court for the Southern District of New York. Case Number: 85 CIV 4378.

2. Name of foreign state concerned: Argentine Republic.
3. Identity of the other parties: Amerada Hess Shipping corporation. United Carriers, Inc. has submitted a request to the court that this case be treated as "related" to an action already pending before the Court which arises out of the same incident, namely *Amerada Hess Shipping Corporation v. Argentine Republic*, 85 CIV 4365 (RLC).
4. Nature of documents served: Summons and Complaint.
5. Nature and purpose of the proceedings: United Carriers, Inc., owner of S/T HERCULES, brings suit for losses suffered as a result of bombing attacks by the Argentine armed forces on S/T HERCULES on or about June 8, 1982. The unprovoked attacks, without warning, on S/T HERCULES were in violation of the law of nations and of the laws of the United States, in that they were committed against the unarmed merchant vessel of a neutral country in innocent passage upon the high seas. As a direct result of the attacks, S/T HERCULES was caused to be scuttled on or about July 20, 1982. Damages are claimed in the amount of \$10,000,000 plus interest.
6. Date of default judgment: Not applicable. A response to a "Summons" and "Complaint" is required to be submitted to the Court not later than thirty (30) days after these documents are received by you. The response may present jurisdictional defenses (including defenses relating to state immunity).
8. The failure to submit a timely response with the Court can result in a Default Judgment and a request for execution to satisfy The judgment. If a Default Judgment has been entered, a procedure may be available to vacate or open that judgment.

22 C.F.R. §93.2 (1984) recites the following paragraph for inclusion in a Notice of Suit:

9. Questions relating to state immunities and to the jurisdiction of United States courts over foreign states are governed by the Foreign Sovereign Immunities Act of 1976, which appears in sections 1330, 1391(f), 1441(d), and 1602 through 1611, of Title 28, United States Code (Pub. L. 94-583; 90 Stat. 2891).

It is the position of Plaintiff United Carriers, Inc., however, that the Foreign Sovereign Immunities Act of 1976 is inapplicable to the action described herein, which arises under the Alien Tort Claims Act, 28 U.S.C. §1350 (1982). The text of the Alien Tort Claim Act is as follows:

§1350. Alien's Action for Tort.

The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

Dated: New York NY
June 21, 1985

BURKE & PARSONS
Attorneys for Plaintiff
United Carriers, Inc.
1114 Avenue of the Americas
New York NY 10036
(212) 354-3800
Ref: 6955

By: Raymond J. Burke Jr.
A Member of the Firm

To: Lic. Dante Caputo
Minister of Foreign Affairs
Ministry of Foreign Affairs
Reconquista 1088

42a

Buenos Aires, 1003,
Argentina

Ambassador
First Secretary
Embassy of Argentina
1600 New Hampshire Avenue N.W.
Washington, DC 20009

No. 87-1372

Supreme Court, U.S.

FILED

NOV 21 1987

JOSEPH F. SPANIO, JR.
CLERK

In the
Supreme Court of the United States
OCTOBER TERM, 1987

ARGENTINE REPUBLIC,

Petitioner,

v.

AMERADA HESS SHIPPING CORPORATION and
UNITED CARRIERS, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

DOUGLAS R. BURNETT
Counsel of Record
HILL, RIVKINS, CAREY,
LOESBERG, O'BRIEN
& MULROY
Attorneys for
Respondent
AMERADA HESS SHIPPING
CORPORATION
21 West Street
New York, New York 10006
(212) 825-1000

RICHARD H. WEBBER
Of Counsel

RAYMOND J. BURKE, JR.
Counsel of Record
BURKE & PARSONS
Attorneys for Respondent
UNITED CARRIERS, INC.
1114 Avenue of the Americas
New York, New York 10036
(212) 354-3800

FRANCES C. PETERS
Of Counsel

Questions Presented

1. Whether the Alien Tort Statute of 1789 provides jurisdiction over a claim by a neutral shipowner, engaged in the United States domestic trade, for an illegal attack against its vessel on the high seas by a foreign state, where the state has also declined redress in violation of international law.
2. Whether the Foreign Sovereign Immunities Act of 1976 ("FSIA") must be construed as preempting the Alien Tort Statute, and as extending immunity to foreign states where international law would not accord it.
3. Whether (i) admiralty jurisdiction and (ii) universal jurisdiction are present in this case.
4. Whether jurisdiction is present in this case under FSIA.

The caption of the case in this court contains the names of all the parties.

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Statutes Cited:

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Alien Tort Statute, 28 U.S.C. § 1350	<i>passim</i>
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In the
Supreme Court of the United States
OCTOBER TERM, 1987

ARGENTINE REPUBLIC,

Petitioner,

v.

AMERADA HESS SHIPPING CORPORATION and
UNITED CARRIERS, INC.,

Respondents,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

Opinions Below

The opinion of the court of appeals (Pet. App. 1a-21a¹), is reported at 830 F.2d 421 (1987). The opinion of the United States District Court for the Southern District of New York (Pet. App. 25a-35a) is reported at 638 F. Supp. 73 (1986).

Jurisdiction

The judgment of the court of appeals was entered September 11, 1987 (Pet. App. 22a). The petitioner's petition for rehearing and suggestion for rehearing *en banc* were denied on November 18, 1987 (Pet. App. 24a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Treaty Provisions and Statutes Involved²

1. The Merchant Marine Act of 1920, 28 U.S.C. § 877, reads in relevant part as follows:

¹ "Pet. App." refers to pages in the Appendix to the Petition.

² Treaties and statutes cited herein are in addition to those in the Petition at pp. 2-4.

§ 877. Coastwise laws extended to island Territories and possessions

From and after February 1, 1922, the coastwise laws of the United States shall extend to the island Territories and possessions of the United States *And provided further*, That the coastwise laws of the United States shall not extend to the Virgin Islands of the United States until the President of the United States shall, by proclamation, declare that such coastwise laws shall extend to the Virgin Islands and fix a date for the going into effect of same.

2. The Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. § 1330, 1602-1611, reads in relevant part as follows:

§ 1603. Definitions

For purposes of this chapter—

. . . .

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

3. The Pan American Convention Relating to Maritime Neutrality of 1928, 47 Stat. 1989, reads in relevant part as follows:

Belligerents to respects rights of neutral Powers.

Article 1. Belligerents are bound to respect the sovereign rights of neutral Powers and to abstain, in neutral territory or neutral waters, from any act which would, if knowingly permitted by any Power, constitute a violation of neutrality.

. . . .

Section IV.—Fulfilment and Observance of the Laws of Neutrality

ART. 27. A belligerent shall indemnify the damage caused by its violations of the foregoing provisions. It shall likewise be responsible for the acts of persons who may belong to its armed forces.

4. The Geneva Convention on the High Seas of 1958, 13 U.S.T. 2312, reads in relevant parts as follows:

5. Where hot pursuit is effected by an aircraft:

(a) The provisions of paragraphs 1 to 3 of the present article shall apply *mutatis mutandis*;

(b) The aircraft giving the order to stop must itself actively pursue the ship until a ship or aircraft of the coastal State, summoned by the aircraft, arrives to take over the pursuit, unless the aircraft is itself able to arrest the ship. It does not suffice to justify an arrest on the high seas that the ship was merely sighted by the aircraft as an offender or suspected offender, if it was not both ordered to stop and pursued by the aircraft itself or other aircraft or ships which continue the pursuit without interruption.

. . . .

7. Where a ship has been stopped or arrested on the high seas in circumstances which do not justify the exercise of the right of hot pursuit, it shall be compensated for any loss or damage that may have been thereby sustained.

5. The Treaty of Friendship, Commerce, and Navigation Between the United States of America and Liberia of 1938, 54 Stat. 1739, reads in relevant parts as follows:

ARTICLE I

The nationals of each High Contracting Party shall enjoy freedom of access to the courts of justice of the other on conforming to the local laws, as well as for prosecution as for defense of their rights, and all decrees of jurisdiction established by law.

. . . .

The nationals of each High Contracting Party shall receive within the territories of the other, upon submitting to conditions imposed upon its nationals, the most constant protection and security for their persons and property, and shall enjoy in

this respect that degree of protection that is required by international law. Their property shall not be taken without due process of law and without payment of just compensation.

Statement of the Case

In 1977, United Carriers, Inc. ("United"), owner of the oil tanker *HERCULES*, time-chartered that vessel to Amerada Hess Shipping Corporation ("Amerada Hess").³ The agreement between Amerada Hess and United contained a charter hire payment clause which provided that monthly payments to United for the use of *HERCULES* were to be made in New York (A41).⁴

From the opening of the Trans-Alaska Pipeline System in 1977 until the incident which forms the basis of these actions, *HERCULES* was continuously employed by Amerada Hess in the United States domestic trade, carrying crude oil from Alaska around the southern tip of South America to its refinery in the U.S. Virgin Islands. The Liberian flag *HERCULES* was permitted to sail in the coastwise trade of the United States—which is otherwise restricted exclusively to American flag vessels by the cabotage provisions of the Merchant Marine Act of 1920⁵—under a narrow exception to the cabotage laws exempting trade between ports of the United States Virgin Islands and ports of the United States and its territories.⁶

³ Amerada Hess Shipping Corporation, a Liberian corporation, is a subsidiary of Amerada Hess Corporation, incorporated in the State of Delaware, United States.

United Carriers, Inc., is a privately held corporation organized and existing under the laws of the Republic of Liberia. United is a subsidiary of one privately held foreign corporation, and is affiliated with various foreign corporations, all of which are privately held. The shares of United, its parent and affiliates are not publicly traded.

⁴ "A" refers to page references in the Joint Appendix on record in the court of appeals.

⁵ 46 U.S.C. § 883.

⁶ 46 U.S.C. § 877. The peculiar status of *HERCULES* as a foreign-flag vessel trading in domestic, interstate U.S. commerce was determined in *American Maritime Ass'n v. Blumenthal*, 590 F.2d 1156, 1158-1160, 1166-1168 (D.C. Cir. 1978), showing, for example, that
(footnote continued on following page)

HERCULES routinely transitted the South Atlantic⁷ where, in April 1982, an armed conflict broke out between the Argentine Republic ("Argentina") and the United Kingdom which has since become known as the Falklands/Malvinas War. On May 25, 1982, *HERCULES* departed the Virgin Islands in ballast, although fully fueled, on a return voyage to Alaska. On June 3, 1982, the United States Maritime Administration transmitted to both the Argentine Republic and the United Kingdom a list of United States flag ships and United States interest ships—including *HERCULES*—which would be crossing the South Atlantic, in an effort to ensure safe passage there for these neutral merchant vessels (A60). During her voyage through the South Atlantic, *HERCULES* continued her usual practice of keeping the United States Coast Guard informed of her course, speed, cargo and destination through a radio station operated by the Argentine government (A62, A67-68, A70, A77).

Without provocation or warning, on June 8, 1982, Argentine military aircraft subjected the neutral *HERCULES* to three separate bombing strikes, at a point on the high seas well outside the exclusion zones declared by the parties to the conflict.⁸ Although not destroyed, *HERCULES* suffered extensive damage from the attacks, and later had to be scuttled due to the unreasonable hazard involved in attempting to remove an undetonated bomb lodged in one of her tanks. Amerada Hess suffered the loss of \$1,901,257.07 in fuel which went down with the vessel. United's loss came to \$10,000.00.

Subsequent attempts by respondents to obtain redress in Argentina for the loss of *HERCULES* were to no avail. Formal

(footnote continued from preceding page)

typically 83% of the refined products derived from *HERCULES'* cargoes was consumed in the continental United States, with the balance purchased directly by the U.S. government, at 1158 incl. n. 10.

⁷ The vessel's width precluded passage through the locks of the Panama Canal.

⁸ Shortly after the bombing, the Republic of Liberia sought clarification of the incident from Argentina by diplomatic notes, and a formal oral demarché regarding the unprovoked attack was delivered to a senior official of the Argentine embassy in Washington by the U.S. Department of State (A131). Argentina never responded to either of these communications.

demands for restitution presented to the government of President Alfonsín were rejected. Leading Argentine law firms approached by respondents, in turn, declined—evidently for political reasons—to pursue Amerada Hess' and United's claims against their government in the Argentine courts (A136-A216).

Unable to obtain so much as a hearing of their claims in Argentina, on June 7, 1985, Amerada Hess and United brought suit against the petitioner in the United States District Court for the Southern District of New York. Respondents sought damages in tort for the loss of the vessel and bunkers (ship's fuel), and alleged that Argentina had violated international law in attacking, without cause, the neutral merchant vessel *HERCULES* on the high seas, and thereafter in refusing to pay compensation.

The jurisdiction of the district court was invoked under the Alien Tort Statute, under the general admiralty and maritime jurisdiction, and under the principle of universal jurisdiction recognized in international law. Petitioner moved to dismiss under F.R. Civ. P. 12(b) for lack of subject matter and personal jurisdiction, on the ground that FSIA was the sole source of jurisdiction in all suits against foreign states, and that petitioner was immune from suit under that act for the violations of international law alleged by Amerada Hess and United.

The district court dismissed respondents' complaints for lack of subject-matter jurisdiction. The court held that "a foreign state is subject to jurisdiction in the courts of this country if, and only if, an FSIA exception empowers the court to hear the case" (Pet. App. 29a). In so holding, the court recognized that its interpretation of FSIA narrowed the jurisdictional scope encompassed by the language of the Alien Tort Statute (Pet. App. 32a). To the district court it was "irrelevant that repeal by implication is disfavored" since, in the court's view, the elimination of a class of defendants under the Alien Tort Statute effected no repeal (Pet. App. 32a-33a). The court ruled that respondents' claims fell outside of "the exceptions to blanket foreign sovereign immunity provided by the FSIA" (Pet. App. 30a), and further found that respondents could "claim no loss whatsoever occurring in the United States" (*ibid.*).

The court of appeals reversed, holding that the Alien Tort Statute provides jurisdiction over respondents' claims, and that the FSIA does not bar it (Pet. App. 3a).⁹

The court initially examined whether the facts alleged by respondents were sufficient to state a violation of international law. Finding that the right of innocent neutral ships to free passage on the high seas was recognized in a series of "international treaties and conventions dating at least as far back as the last century," that "federal courts have long recognized in a variety of contexts that attacking a merchant ship without warning or seizing a neutral's goods on the high seas requires restitution," and that the academic literature was similarly "of one voice with regard to a neutral's right of passage," the court concluded that it was "beyond controversy that attacking a neutral ship in international waters, without proper cause for suspicion or investigation, violates international law."

The court next determined that respondents' actions met the requirements for federal district court jurisdiction set forth in the Alien Tort Statute. The court held that:

Although seldom employed, the Alien Tort Statute means what it says. If an alien brings a suit, for a tort only, that sufficiently alleges a violation of the law of nations, then the district court has jurisdiction. See *Filartiga*, 630 F.2d 876. All of these requirements are met in the instant case. Appellants are aliens; they are Liberian corporations. This suit is for a tort only—the bombing of a ship without justification. Also . . . the suit alleges a violation of international law. (Pet. App. 7a-8a).

The court rejected petitioner's contention that the Alien Tort Statute could only be invoked against individual defendants, since Congress did not explicitly provide for jurisdiction over states and absolute sovereign immunity was recognized at the time of its enactment. While expressing doubt as to whether absolute sovereign immunity would have governed then under

⁹ A dissenting opinion was filed by one member of the panel.

the circumstances of this case,¹⁰ the court held that the jurisdictional grant of the Alien Tort Statute is to be construed according to current standards of international law (Pet. App. 8a-9a).

The court found that modern international law does not extend immunity to states for international law violations. Noting, *inter alia*, such developments in this century as the rejection of sovereign immunity defenses by the Nuremberg tribunal and the emerging international law prohibition of genocide, the court reasoned that, were the result otherwise, "the exception would nearly swallow the rule" and international law, even in theory, would have little meaning (Pet. App. 9a-10a). Having established that the sinking of a neutral vessel on the high seas without justification violates a substantive principle of international law for which there is no immunity, the court held that the Alien Tort Statute provides jurisdiction over Argentina (Pet. App. 10a).

The court then addressed petitioner's argument that the jurisdictional grant of the Alien Tort Statute was preempted by FSIA. While the court held that FSIA as a general rule is the sole basis for United States jurisdiction over foreign states, it found that the act's principal goals—to restrict the rules of immunity respecting the commercial activities of states, to remove immunity decisions from the executive to the judicial branch so as to ensure these decisions were made on purely legal grounds, and to unify the rules of procedure relating to suits against foreign states—did not evince an intent on the part of Congress to extinguish existing remedies in United States courts for violations of international law of the type alleged by respondents (Pet. App. 11a-13a).

Since Congress had expressed its intent to incorporate standards recognized under international law in its enactment of FSIA, and moreover had left the Alien Tort Statute intact, the court held that FSIA would not bar jurisdiction under the unusual circumstances of this case (Pet. App. 13a). The court

¹⁰ The court had earlier observed that "[w]here the attacker has refused to compensate the neutral, such action is akin to piracy, one of the earliest recognized violations of international law" (Pet. App. 7a).

found personal jurisdiction over Argentina was proper since, *inter alia*, the act complained of was tortious injury to a vessel plying the United States domestic trade pursuant to a contract calling for payment in the United States, and the United States government's direct communication to Argentina of its interest in *HERCULES'* safety was sufficient to put Argentina on notice that it might be sued here. The court was further mindful of considerations of fairness, since respondents had been denied an Argentine forum in which to pursue their claims.

The court emphasized that its holding "is a narrow one," and that—

[i]t should also be noted that the burden on a plaintiff moving under the Alien Tort Statute remains great. The class of actions that are recognized as international law violations, as distinguished from a mere tort, is quite small. Moreover the sovereign defendant or its action must have sufficient contacts to satisfy the constitutional requirements of personal jurisdiction. And finally, the procedural requirements of the FSIA, restricting execution of judgment for example, see *Letelier v. Republic of Chile*, 748 F.2d 790 (2d Cir. 1984), cert. denied, 471 U.S. 1125, 105 S.Ct. 2656, 86 L.Ed. 2d 273 (1985) would still have to be considered

The dissent did not address itself to the meaning of the Alien Tort Statute, or to the question of immunity under international law for the actions complained of by respondents, since it concluded that FSIA had foreclosed consideration of respondents' claims.

REASONS FOR DENYING THE WRIT

A. The decision below upholds the right of a neutral ship to free passage on the high seas, and turns squarely on peculiar facts unlikely to recur.

The decision below is important, not for the reasons stated by petitioner, but as a contemporary reaffirmation of international law on the neutral's right of innocent passage in

modern warfare. The opinion carefully recites the overwhelming precedent under both American and international law, codifying and enforcing the neutral shipowner's private right under international law to restitution for violation of the right of innocent passage (Pet. App. 5a-7a). As Chief Judge Feinberg's opinion notes, "the relative paucity of cases litigating this customary rule of international law underscores the long standing nature of this aspect of freedom of the high seas." (Pet. App. 7a). Indeed, when neutral Argentine ships have been sunk by a belligerent, petitioner has adamantly demanded, and received, compensation.¹¹

It is plain that petitioner's acts in unlawfully attacking a neutral ship on the high seas *and then* refusing the neutral a forum or compensation are wide of the mark universally accepted by states under international law. By diplomacy, private arbitration, or prize courts, virtually all states meet their compensation obligations under international law.¹² Argentina has consistently failed to respond to all attempts to resolve this dispute, whether by diplomacy, negotiation or private arbitration. Argentina's responsibility for these high seas attacks on the neutral HERCULES is not in issue. Even the United States government admits that "Argentina should bear responsibility for its actions that are the subject of the instant litigation." (Brief for the United States as *Amicus Curiae* in Support of Appellee's Petition for Rehearing *En Banc*, filed September 29, 1987.) Further review by this Court of the neutral shipowner's right of innocent passage, one of the most ancient "norms" of international law, is not warranted.

¹¹ Argentina demanded and received compensation from Germany for the sinking of two neutral Argentine merchant ships on the high seas by U-boats. *New York Times*, August 24, 1917, p. 1., and Scheina, *Latin America, A Naval History—1810-1987* (1987), pp. 101-102.

¹² Recent non-prize cases show no waiving by foreign states in their obligation to honor restitution claims of neutral ships. In 1938, Japan paid \$2,211,007 for restitution claims arising from attacks by Japanese Navy aircraft on USS PANAY and three neutral American oil tankers under her escort. Stanley, *Prelude to Pearl Harbor* (1965), n. 11 at 106; in 1944, the

(footnote continued on following page)

The holding in this case rests on unique facts unlikely to recur. The opinion below correctly recognized the special facts of this case and properly described its holding as "a narrow one." (Pet. App. 15a) As noted previously, the lawful participation of a foreign-flag ship like HERCULES in U.S. domestic trade derives from a 1920 anomaly created by Congress in this nation's cabotage laws for the U.S. Virgin Islands, 46 U.S.C. § 877. It was not until HERCULES' maiden voyage with Alaskan oil that this obscure statutory exception even came to the attention of the courts. *American Maritime Association v. Blumenthal*, 590 F.2d 1156 (D.C. Cir. 1978). The statute's express language makes its continued existence subject to unilateral action by the President.¹³ Within the past three months, the Commission on Merchant Marine and Defense strongly recommended that the President consider closing the U.S. Virgin Islands "loophole."¹⁴ These first-of-their-kind facts, involving a state attacking a foreign-flag ship in U.S. domestic trade, and then refusing compensation or a forum, are unlikely to recur. The statutory basis upon which the facts arose, so crucial to the decision below, is exceedingly narrow.

(footnote continued from preceding page)

United States agreed to compensate the Soviet Union for damage sustained to the neutral Russian tanker EMBA, attacked on the high seas by a U.S. Army Air Force bomber. U.S. Government Printing Office, *Foreign Relations of the United States, Diplomatic Papers*, 1944, Vol. IV, at 990, 1031-1032; in 1987, an arbitration panel in Switzerland awarded British owners of the Greenpeace ship RAINBOW WARRIOR \$5,000,000 in compensation and \$1,200,000 in aggravated damages against France for the sinking of the ship by French frogmen, Oct. 2, 1987, *United Press International*; and in 1988, Iraq agreed to compensate the U.S. Government and survivors of the USS STARK, *The New York Times*, January 31, 1988, p. 9.

¹³ "[T]he coastwise laws of the United States shall not extend to the Virgin Islands of the United States until the President of the United States shall, by proclamation, declare that such laws shall extend to the Virgin Islands" 46 U.S.C. § 877.

¹⁴ *The Second Report of The Commission on Merchant Marine and Defense: Recommendations*, December 31, 1987, pp. 2 and 20-21. Pursuant to P.L. 98-525, the Commission was established to report to the President and Congress on strengthening maritime transportation in a national emergency.

Foreign-flag shipping participation in U.S. domestic trade is by statute small and may be terminated at any time by either the President or Congress. The singular statutory framework giving rise to the facts in this case, when combined with petitioner's equally aberrant conduct in refusing to provide the injured neutral either a forum or compensation, highlight the unique character of this case and the unlikelihood of further cases of its kind.¹⁵

B. The "conflicts" alleged by petitioner do not warrant review by this Court.

Contrary to petitioner's assertion that the decision below was rendered "in total disregard" of FSIA (Pet. 10), the court of appeals examined fully the purpose and provisions of that act, and in considering its effect on the Alien Tort Statute arrived at a result in this case which is consonant with international law and with long-standing principles of statutory construction.

It is axiomatic that repeals by implication are not favored, *Rodrigues v. United States*, 480 U.S. —, 108 S.Ct. —, 94 L.Ed.2d 533, 536 (1987). Absent Congressional intent to repeal which is "clear and manifest," where two statutes are capable of co-existence it is the duty of the courts to regard each as effective, *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155-158 (1976). Moreover, it has long been settled that "an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains," *The Charming Betsey*, 6 U.S. (2 Cranch) 64, 116 (1804) (Marshall, C.J.).

There is no mention of the Alien Tort Statute in FSIA, and the court of appeals in a close examination of the legislative history of that act found no intention on the part of Congress to remove existing remedies¹⁶ in United States courts for

¹⁵ This Court's own experience in deciding questions of a neutral shipowner's right to restitution against a foreign state is illustrative of the infrequency of these disputes in U.S. courts. The last case decided by this Court was *The Steamship Appam*, 243 U.S. 124 (1917).

¹⁶ See 1 Op. Atty Gen 57-59 (1795); *Martins v. Ballard*, 16 F. Cas. 923 (D.S.C. 1794) (No. 9,175). The Supreme Court has also recognized in *O'Reilly de Camara v. Brooke*, 209 U.S. 45, 50 (1908), that jurisdiction under the Alien Tort Statute "depends upon the

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international law violations of the type presented by this case. Since a principal purpose of FSIA is to restrict immunity with regard to commercial activities, the court correctly reasoned that "it would be odd to hold that, by enacting a statute designed to narrow the scope of sovereign immunity in the commercial context, Congress, though silent on the subject, intended to broaden the scope of sovereign immunity for violations of international law" (Pet. App. 12a). As current international law denies immunity for such violations, the court declined to arrive at an interpretation of FSIA which would bring it into conflict with international law in the absence of clear Congressional intent. Rather than adopting an interpretation of FSIA which would effect an implied repeal of the Alien Tort Statute, the court *reconciled* the jurisdictional provisions of these two statutes in a manner consistent with the immunity rules of current international law.¹⁷ As the court of appeals acknowledged (Pet. App. 16a), if Congress wishes to amend the Alien Tort Statute, it may do so, but it is not the province of the judiciary to rewrite the plain language of a statute, *United States v. Great Northern Railway Co.*, 343 U.S. 562, 575 (1957).

Respondents argued below that the result in this case is also proper under § 1605(a)(5) of FSIA. Under § 1603(c) of FSIA, the term "United States" includes "all territory and waters, continental and insular, subject to the jurisdiction of the United States" (emphasis added). The attack on HERCULES took place on the high seas, "waters . . . subject to the jurisdiction of the United States" For example, in *The Plymouth*, 70 U.S. (3 Wall.) 20, 36 (1865), the Supreme Court defined tort jurisdiction in admiralty as follows:

(footnote continued from preceding page)

establishment of a 'tort only in violation of the law of nations or a treaty of the United States,' " elements the plaintiff was unable to establish in that case.

¹⁷ The Ninth Circuit has also recognized that exceptions to immunity in FSIA are "based upon the general presumption that states abide by international law and, hence, violations of international law are not 'sovereign' acts," *West v. Multibanco Comer-mex*, 807 F.2d 820, 826 (9th Cir. 1987), cert. denied, 55 U.S.L.W. 3807 (1987) (emphasis added).

"Every species of tort, however occurring, and whether onboard a vessel or not, *if upon high seas* or navigable waters, is of admiralty cognizance." (Emphasis added)¹⁸

Under 28 U.S.C. § 1603(c), therefore, the tortious attack on *HERCULES* occurred within the "United States." The loss of charter hire payments due to *United* in New York satisfies the statute's requirement of an "injury occurring within the United States," as does the disruption to Amerada Hess' American refining operations caused by the loss of use of the vessel. Accordingly, since both the tort and the injury occurred within the United States, jurisdiction may be found over Argentina under 1605(a)(5). See Brief of the Republic of Liberia as *Amicus Curiae*, dated September 10, 1987 (App. 1a). The issue of 1605(a)(5) jurisdiction was not reached by the court of appeals, and would remain for determination on remand (Pet. App. 17a, n. 3).

There is no "conflict" engendered by the court of appeals' assertion of personal jurisdiction over Argentina. The court's consideration of fairness in its decision to exercise jurisdiction is entirely appropriate, since principles of equity are common to both federal common law and international law, *First National City Bank v. Banco Para El Com.*, 462 U.S. 611 (1983). Petitioner's argument that it is only the defendant's contacts with the forum which are relevant to an assertion of personal jurisdiction is erroneous. Personal jurisdiction may be based upon the effects which a defendant's actions have caused within the forum, *Calder v. Jones*, 465 U.S. 783 (1984). The action of Argentina in attacking the neutral *HERCULES* was directed against a vessel in the United States domestic trade, and resulted in the disruption of contractual payments due in the United States. The effect of Argentina's attack was to cause injury within the United States; the fact that the attack itself occurred on the high seas does not prevent a United States court from exercising jurisdiction over a cause of action arising out of that injury. *Id.* at 787-790.

¹⁸ This was modified in *Executive Jet Aviation Co. v. Cleveland*, 409 U.S. 249 (1972) to "require also that the wrong bear a significant relationship to traditional maritime activity." *Id.* at 268.

Subsection (2)(k) of § 421 of the Restatement of Foreign Relations Law of the United States (Tent. Draft No. 6, April 12, 1985) ("Revised Restatement") recognizes a similar "effects" test with respect to jurisdiction to adjudicate under international law. Moreover, comment (a) to § 404 of the Revised Restatement, entitled "Universal Jurisdiction to Define and Punish Selected Offenses" makes it clear that universal jurisdiction is also recognized in "the corresponding section concerning jurisdiction to adjudicate (§ 423)." § 423 is concerned with the jurisdiction of states "to adjudicate in aid of universal and other non-territorial crimes." Comment (b) to § 404 makes it clear that universal jurisdiction may extend to civil cases. The principle of universality is plainly applicable, to both jurisdiction to prescribe and jurisdiction to adjudicate.

The decision of the court of appeals does not "conflict" with the decision in *Verlinden B. V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983), nor does it "conflict" with any decision in the circuit courts. *Verlinden* examined FSIA to determine its constitutionality. The question of jurisdiction under the Alien Tort Statute is not presented in that case, any more than it is presented in any of the circuit court decisions relied on by petitioner.¹⁹ *There has been no other decision in any circuit court as to the effect of these two statutes where a claim of violation of international law is asserted against a foreign state.* That issue has been decided in only three cases in the district courts, all of which concerned injuries alleged to have occurred *within the territory* of a foreign state.²⁰ In

¹⁹ *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985) (Pet. 15, n. 5) involved alleged acts of terrorism, a subject as to which there is no international consensus. Although differing as to rationale, the panel held that jurisdiction had not been established under the Alien Tort Statute, and further that the action was time-barred. The references to FSIA in two of the concurrences are therefore dicta.

²⁰ *Von Dardel v. U.S.S.R.*, 623 F. Supp. 246 (D.D.C. 1985) (finding jurisdiction over the Soviet Union for violation of
(footnote continued on following page)

contrast, the decision below involves an injury occurring *on the high seas*, where the act-of-state doctrine does not apply, as well as the violation of principles which have been the subject of consensus among nations since ancient times. Respondents are aware of *no similar case in any court*, and the holding below, which is tied to singular facts, is too narrow to warrant review by the Court on certiorari.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

DOUGLAS R. BURNETT
Counsel of Record
HILL, RIVKINS, CAREY,
LOESBERG, O'BRIEN
& MULROY
Attorneys for
Respondent
AMERADA HESS SHIPPING
CORPORATION
21 West Street
New York, New York 10006
(212) 825-1000
RICHARD H. WEBBER
Of Counsel

RAYMOND J. BURKE, JR.
Counsel of Record
BURKE & PARSONS
Attorneys for Respondent
UNITED CARRIERS, INC.
1114 Avenue of the Americas
New York, New York 10036
(212) 354-3800
Frances C. Peters
Of Counsel

APPENDIX

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diplomatic immunity); *contra*, *In Re Korean Airlines Disaster of September 1, 1983*, 597 F. Supp. 613 (D.D.C. 1984) and *Siderman v. Republic of Argentina*, No. CV 82-1772-RMT (C.D. Cal., March 7, 1985). Further proceedings are pending in *Von Dardel* and *Siderman*.

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in the U.S. Court of Appeals for the Second Circuit

86-7602,03

IN THE
United States Court of Appeals
FOR THE SECOND JUDICIAL CIRCUIT

AMERADA HESS SHIPPING CORPORATION,
Appellant,

v.

ARGENTINE REPUBLIC,
Appellee.

85 CIV 4365 (RLC)

UNITED CARRIERS, INC.,
Appellant,

v.

ARGENTINE REPUBLIC,
Appellee.

85 CIV 4378 (RLC)

BRIEF OF THE REPUBLIC OF LIBERIA
AS *AMICUS CURIAE*

FRANK L. WISWALL, JR.,
Counsel for The Republic of
Liberia as *amicus curiae*
11870-D Sunrise Valley Drive
Reston, Virginia 22091-3303
(703) 620-6780

*Brief of the Republic of Liberia as Amicus Curiae
in the U.S. Court of Appeals for the Second Circuit*

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APPEAL NOS. 86-7602, 03

IN THE

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85 CIV 4378 (RLC)

**BRIEF OF THE REPUBLIC OF LIBERIA
AS AMICUS CURIAE**

Opinion Below

The Memorandum and Order of the United States District Court for the Southern District of New York is set forth in the joint Appendix to the Briefs, A. 541-53.

*Brief of the Republic of Liberia as Amicus Curiae
in the U.S. Court of Appeals for the Second Circuit*

Questions Presented

(I) Whether the Treaty of Friendship, Commerce and Navigation between the United States and Liberia grants to appellants standing to litigate their claims in the Courts of the United States.

(II) Whether the District Court erred in dismissing appellants' complaints.

Treaty Provisions Involved

TREATY OF FRIENDSHIP, COMMERCE
AND NAVIGATION
BETWEEN
THE UNITED STATES AND LIBERIA.
SIGNED AT MONROVIA, AUGUST 8, 1938
(54 STAT. 1739, T.S. NO. 956).

ARTICLE I

• • • • •

The nationals of each High Contracting Party shall enjoy freedom of access to the courts of justice of the other on conforming to the local laws, as well for the prosecution as for the defense of their rights, and in all degrees of jurisdiction established by law.

The nationals of each High Contracting Party shall receive within the territories of the other, upon submitting to conditions imposed upon its nationals, the most constant protection and security for their persons and property, and shall enjoy in this respect that degree of protection that is required by international law. Their property shall not be taken without due process of law and without payment of just compensation.

• • • • •
• • • • •

*Brief of the Republic of Liberia as Amicus Curiae
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ARTICLE VII

Between the territories of the High Contracting Parties there shall be freedom of commerce and navigation. The nationals of each of the High Contracting Parties equally with those of the most-favored nation, shall have liberty freely to come with their vessels and cargoes to all places, ports and waters of every kind within the territorial limits of the other which are or may be open to foreign commerce and navigation.

.

ARTICLE XVI

Merchant vessels and other privately owned vessels under the flag of either of the High Contracting Parties shall be permitted to discharge portions of cargoes at any port open to foreign commerce in the territories of the other High Contracting Party, and to proceed with the remaining portions of such cargoes to any other ports of the same territories open to foreign commerce, without paying other or higher tonnage dues or port charges in such cases than would be paid by national vessels in like circumstances, and they shall be permitted to load in like manner at different ports in the same voyage outward, provided, however, that the coasting trade of the High Contracting Parties is exempt from the provisions of this Article and from the other provisions of this Treaty, and is to be regulated according to the laws of each High Contracting Party in relation thereto. It is agreed, however, that nationals and vessels of either High Contracting Party shall within the territories of the other enjoy with respect to the coasting trade most-favored-nation treatment.

ARTICLE XVII

Limited liability and other corporations and associations, whether or not for pecuniary profit, which have been or may hereafter be organized in accordance with and under the laws, National, State or Provincial, of either High Contracting Party

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and which maintain a central office within the territories thereof, shall have their juridical status recognized by the other High Contracting Party provided that they pursue no aims within its territories contrary to its laws. They shall enjoy free access to the courts of law and equity, on conforming to the laws regulating the matter, as well for the prosecution as for the defense of rights in all the degrees of jurisdiction established by law.

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Foreign Law Involved

LIBERIAN CODE OF LAWS REVISED

TITLE 5: ASSOCIATIONS LAW

PART I: BUSINESS CORPORATIONS

[The Liberian Business Corporation Act of 1976]

CHAPTER 2. CORPORATE PURPOSES AND POWERS

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§ 2.5 Effect of incorporation: corporation as proper party to
action

A corporation is a legal entity, considered in law as a fictional person distinct from its shareholders or members, and with separate rights and liabilities. The corporation is a proper plaintiff in a suit to assert a legal right of the corporation and a proper defendant in a suit to assert a legal right against the corporation;

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**CHAPTER 3. SERVICE OF PROCESS;
REGISTERED AGENT**

§ 3.1. Registered agent for service of process.

1. **Registered agent.** Every domestic corporation or foreign corporation authorized to do business in Liberia or foreign maritime trust or foreign maritime corporation registered under the provisions of section 13.1 shall designate a registered agent in Liberia upon whom process against such corporation or any notice or demand required or permitted by law to be served may be served. The agent for a corporation having a place of business in Liberia shall be a resident domestic corporation having a place of business in Liberia or a natural person, resident of and having a business address in Liberia. The registered agent for a domestic or foreign corporation not having a place of business in Liberia or for a foreign maritime trust or corporation shall be a domestic bank or trust company with a paid in capital of not less than \$50,000, which is authorized by the Legislature of the Republic to act as registered agent for such corporations or trusts. A domestic corporation, authorized foreign corporation, foreign maritime trust or foreign maritime corporation which fails to maintain a registered agent shall be dissolved or its authority to do business or registration shall be revoked, as the case may be, in accordance with sections 11.3, 12.7 or 13.4.

Statement of the Case

Amicus adopts the Statement set forth in the joint Brief of Appellants.

Summary of Argument

The law of the United States grants by Treaty a right to appellants to litigate their claims in the Courts of the United States. Jurisdiction lies under both the Alien Tort Statute and the Foreign Sovereign Immunities Act because appellants' losses occurred in part within the United States, and appellee enjoys no sovereign immunity from suit in this matter. There is no alternative forum open to appellants, and the District Court erred in dismissing their complaints.

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ARGUMENT

I. The Treaty of Friendship, Commerce and Navigation Between the United States and Liberia guarantees to the Plaintiffs-Appellants a Right of Access to the Courts of the United States Equal to That of Citizens of the United States.

The Treaty of Friendship, Commerce and Navigation between the United States and Liberia (FCN Treaty) of 1938, 54 Stat. 1739, T.S. No. 956, guarantees generally in Article I (*supra* p. 2) "freedom of access to the courts of justice" by Liberian nationals seeking redress in the United States.¹

The Court below recognized the juridical status of appellants, finding as a fact that they are Liberian corporations (A. 543). *Amicus* confirms that this is so, and that both are corporate nationals in good standing. Of course, both appellants have the capacity to sue and be sued. See § 2.5 of the Liberian Business Corporation Act, *supra*, p. 4.

The law of this Court with regard to standing to sue under such clauses as the ones in the present FCN Treaty was declared most clearly in *The Nordic Regent (Alcoa S.S. Co., Inc. v. m/v Nordic Regent)*, 654 F.2d 147, 1980 AMC 309 (2 Cir., 1980), cert. den. 449 U.S. 890 (1980), where in writing for a majority of the entire Circuit bench and commenting upon *Farmanfarmaian v. Gulf Oil Corp.* 588 F.2d 880 (2 Cir., 1978), Judge Timbers noted that with regard to the standard FCN Treaty phrase "access to the courts": "Such access would have

¹ By Article XVII of the FCN Treaty (*supra* p. 3), this right is made more specific with regard to Liberian corporations doing business in the United States, to wit: "They shall enjoy free access to the courts of law and equity, on conforming to the laws regulating the matter, as well as for the prosecution as for the defense of rights in all the degrees of jurisdiction established by law." While Article XVII is clearly intended to address the conduct of business of corporations of one Party within the territory of the other Party, it may be argued that the jurisdiction clause of Article XVII is applicable to this case. If so, then these corporate nationals have also satisfied the requirement of maintaining a "central office" by complying with § 3.1 of the Liberian Business Corporation Act (*supra*, p. 5), and both have appointed The International Trust Company of Liberia as Registered Agent in Liberia.

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little value if the door that admits is a revolving one." 654 F.2d 147, 153, 1980 AMC 309, 318, fn. 6. Such right of access is, of course, independent of the grounds upon which relief is sought, and the appellants must bring a cognizable cause of action against a suable defendant.

Amerada Hess Oil Corporation and United Carriers, Inc. stand before the Courts of the United States in the shoes of American citizens for purposes of asserting their claims. The basic question therefore becomes that of jurisdiction over defendant-appellee, the Republic of Argentina.

II. The Republic of Argentina Enjoys no Immunity from Suit in this Matter.

A. The Alien Tort Statute:

Plaintiffs-appellants have invoked the Alien Tort Statute, 28 U.S.C. 1350: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." (Emphasis supplied.) The U.S.-Liberia FCN Treaty provides that: "The nationals of each High Contracting Party shall receive within the territories of the other, upon submitting to conditions imposed upon its nationals, the most constant protection and security for their persons and property, and shall enjoy in this respect that degree of protection that is required by international law." (Article I, *supra*, p. 2; emphasis supplied.)

The significance of these words to *amicus* is that "any civil action" grants jurisdiction notwithstanding the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§ 1330, 1602 *et seq.*, where the tort committed is "in violation of the law of nations", and this was the conclusion reached in *Van Dardel v. U.S.S.R.*, 623 F. Supp. 246 (D.D.C. 1985). The Alien Tort Statute does not require that the tort be committed within the United States, nor does the FCN Treaty require that the property which is the subject of protection be located within the United States. What the FCN Treaty does require is that appellants receive within the United States "that degree of protection that is required by international law" for their property capable of protection by

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the United States, which must certainly include the rights of appellants in and to their property. It is the violation of international law which resulted in the destruction of appellants' property that is at issue, and appellants have brought their claims within the United States upon their rights to their destroyed property.

These alien appellants seek the protection of their property rights in the Courts of the United States, alleging deprivation by a tort committed in violation of the law of nations. The law of the United States, as expressed in the Alien Tort Statute and the FCN Treaty, entitles appellants to their day in the District Court of the United States.

B. The Foreign Sovereign Immunities Act:

The Court below took the FSIA as controlling in this matter, and granted appellee's motion to dismiss on grounds that appellants had made out none of the exceptions to immunity in 28 U.S.C. §§ 1605-1607. The District Court found as a fact that "these Liberian plaintiffs . . . can claim no loss whatsoever occurring in the United States." (A. 548.) But in the same paragraph the Court below noted that the language of § 1605(a) has been given broad interpretation in deciding the issue of jurisdiction. (A. 547-48.)

The record before this Court shows by uncontradicted evidence that both appellants suffered losses of property within the United States.

The District Court found as a fact that the HERCULES was engaged under time charter in a routine trade between two ports of the United States. (A. 543.) The HERCULES was carrying out this domestic U.S. port-to-port trade under Articles VII and XVI of the FCN Treaty (*supra*, p. 3).

Appellant United Carriers, Inc., owner of the HERCULES, suffered the loss of their vessel while she was employed in the U.S. domestic trade, and *amicus* submits that this is properly regarded as the loss of a property right occurring in the United States. Even more directly, the owner suffered loss of the U.S. charter hire, payable in U.S. dollars in the United States. This appears from Plaintiffs' Exhibit 1A, (A. 42), which the Court

*Brief of the Republic of Liberia as Amicus Curiae
in the U.S. Court of Appeals for the Second Circuit*

below was bound to accept as proven fact for purposes of ruling upon the Motion to Dismiss, but which was ignored by the Court.

As to appellant Amerada Hess Shipping Corporation, their loss was not only the bunkers aboard the vessel, which were sold and delivered within the United States, but also the frustration of the charterparty which caused them to lose their right to the use of the vessel in the U.S. domestic trade.

Amicus does not see how it is possible to characterize these losses otherwise than as occurring in the United States, and submits that the decision of the District Court was clearly erroneous in finding that "no loss whatsoever" occurred in the United States. *McAllister v. United States*, 348 U.S. 19 (1954). Both the loss to her owner of future earnings from the HERCULES and the loss to her charterer of future use of the vessel, while not quantified as separate elements of the damages, are losses from the same operative cause and are sufficient to vest jurisdiction under the FSLA, 28 U.S.C. § 1605(a)(5).

III. Plaintiffs have no Alternative Forum.

The District Court, in granting appellee's Motion to Dismiss, had no occasion to address the issue of *forum non conveniens*. But the record makes amply clear the total absence of any forum in Argentina or of any mutual agreement upon any other forum. There are no known assets of defendant-appellee in Liberia, rendering meaningless any suit in this matter in the Liberian Courts even before the question of jurisdiction arises. The only forum with both jurisdiction and the ability to grant relief is the United States District Court.

While it would be for the District Court on remand to consider the issue of *forum non conveniens* under either the Alien Tort Statute and/or the FSLA, this Court is already aware on the record before it that affirmance of the District Court's decision will leave plaintiffs-appellees without recourse to justice in *any* forum. That, *amicus* submits, is an element of fundamental importance which it is proper for this Court to bear in mind on the disposition of this appeal.

*Brief of the Republic of Liberia as Amicus Curiae
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CONCLUSION

Amicus submits that jurisdiction over defendant-appellee lies under the Alien Tort Statute without regard to the FSLA, but that the FSLA may be properly applied as well because both appellants seek money damages for losses of property occurring in the United States and caused by the tortious act of appellee.

Where no other forum is available which can offer any relief to appellants, and where the U.S.-Liberia FCN Treaty guarantees their free access to the Courts of the United States, the matter in question is an appropriate one for determination on the merits by the United States District Court for the Southern District of New York.

The Order of Dismissal below should be vacated, and these cases remanded to the District Court for trial on the merits.

Dated September 10, 1986

Respectfully submitted,

FRANK L. WISWALL, JR.,
Counsel for The Republic of
Liberia as *amicus curiae*
11870-D Sunrise Valley Drive
Reston, Virginia 22091-3303
(703) 620-6780

Michael Davies-Sekle, on the Brief

*Brief of the Republic of Liberia as Amicus Curiae
in the U.S. Court of Appeals for the Second Circuit*

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Certificate of Service

I hereby certify that on this 10th day of September, 1986, two copies of the within Brief *amicus curiae* were mailed, postage prepaid, to each Counsel for the parties listed below. I further certify that, as of this date, all parties required to be served have been served.

FRANK L. WISWALL, JR.,
Counsel for The Republic of
Liberia as *amicus curiae*
11870-D Sunrise Valley Drive
Reston, Virginia 22091-3303
(703) 620-6780

Counsel for Appellant Amerada Hess Shipping Corporation:

RICHARD H. WEBBER, Esquire
Hill, Rivkins, Carey, Loesberg,
O'Brien & Mulroy
21 West Street
New York, New York 10006

Counsel for Appellant United Carriers, Inc.:

RAYMOND J. BURKE, JR., Esquire
Burke & Parsons
1114 Avenue of the Americas
New York, New York 10036

Counsel for Appellee:

BRUNO A. RISTAU, Esquire
Kaplan, Russin & Vecchi
1218 16th Street, N.W.
Washington, D.C. 20036

ANTHONY E. DAVIS, Esquire
Kaplan, Russin, Vecchi & Kirkwood
28 West 44th Street
New York, New York 10036

4
No. 87-1372

Supreme Court, U.S.

FILED

MAR 30 1988

JOSEPH E. SPANIOLO, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

ARGENTINE REPUBLIC,

Petitioner,

v.

AMERADA HESS SHIPPING CORPORATION AND
UNITED CARRIERS, INC.

Respondents.

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT**

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

BRUNO A. RISTAU
Counsel of Record
KAPLAN RUSSIN & VECCHI
1215 Seventeenth St., N.W.
Washington, D.C. 20036
(202) 887-0353

Attorney for the Petitioner

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1. Respondents' brief in opposition to the petition for certiorari lists as their third question presented "Whether (i) admiralty jurisdiction and (ii) universal jurisdiction are present in this case" (Br. Opp., first page). That question was not decided below, is not set forth in the three questions presented in the petition or fairly included therein, and should not be considered by the Court. See this Court's Rule 21.1(a); *Berkemer v. McCarthy*, 468 U.S. 420, 443 n. 38 (1984).¹

¹ Respondents also seek to tender in their fourth question

2. Respondents' contention that the Alien Tort Statute, 28 U.S.C. § 1350, provides an independent jurisdictional basis for suits by aliens against foreign states for violations of international law is refuted by the Solicitor General's *amicus curiae* brief in support of the petition. We shall not burden this reply with a repetition of the Solicitor General's presentation.

Respondents have failed to advance any rational basis for their hypothesis that the 1st Congress which enacted the Alien Tort Statute was so solicitous of claims by non-resident aliens against foreign sovereigns as to constitute the then newly-established federal district courts as arbiters of such claims (Br.Opp. 12-13). This Congressional solicitude, as perceived by the respondents, is supposed to have found expression in a statute passed in an era when this young Republic sought to maintain a delicate balance in its relations with the dominant European monarchies who alone, in all likelihood, would have been the targets of private lawsuits claiming violations of the law of nations. Moreover, this extraordinary Congressional

presented the issue whether subject-matter jurisdiction over the claims asserted against the petitioner could be predicated on the tort exception contained in §1605(a)(5) of the FSIA. Their argument that "the tortious attack on the HERCULES occurred within the 'United States' " (Br.Opp. at 14) was considered and rejected by the district court (Pet. App. 30a-31a); although raised by the respondents on appeal, it was also not addressed by the court below.

Moreover, the argument is without support in law. It is settled that the tort claims exception of the FSIA applies only to torts that occur in the territory or in territorial waters of the United States. *Persinger v. Islamic Republic of Iran*, 729 F.2d 835 (D.C.Cir. 1984), *cert.denied*, 469 U.S. 881 (1984); *McKeel v. Islamic Republic of Iran*, 722 F.2d 582 (9th Cir. 1983), *cert.denied*, 469 U.S. 880 (1984).

action is supposed to have taken place at a time when the doctrine of immunity from suit of both the domestic sovereign² and of foreign sovereigns³ ruled supreme. Respondents' hypothesis is untenable as a matter of history, law and logic.

Respondents' alternative argument is equally devoid of merit. They say that even if there was no remedy against a foreign sovereign under the Alien Tort Statute in 1789, the existence of such a remedy should be presumed in 1976 when the Foreign Sovereign Immunities Act ("FSIA") was enacted. This is so, they say, because the international law of state immunity had undergone dramatic changes during the past two centuries. On that premise, they urge that since there is "no mention of the Alien Tort Statute in FSIA," courts should not attribute to the 94th Congress that passed the FSIA an intention "to remove *existing remedies* in United States courts for international law violations of the type presented in this case." (Br.Opp. at 12-13; emphasis added.)

The argument fails for several reasons: first, in 1976 claims against foreign sovereigns for alleged violations of international law were not justiciable in the courts of this country and respondents cite no authority which even remotely suggests that such

² In the 81st Federalist, Hamilton pronounced it "inherent in the nature of sovereignty, not to be amenable to suit of an individual, *without its consent*." The Federalist No. 81, 511 (Hamilton) (B.Wright ed. 1961) (emphasis in the original).

³ See 2 C. Hyde, *International Law chiefly as Interpreted and Applied by the United States* § 113 at 36 (2d ed. rev. 1945). See also, Vattel, *The Law of Nations*, Bk. 2, c. III, §36 (1758) (Chitty ed. 1863); *Nathan v. Virginia*, 1 Dall. (Pa.) 77 (1781); *de Moitez v. The South Carolina*, Bee 422 (Admiralty Court of Pa. 1781).

remedy existed. Indeed, there is no such authority. Second, no claim *against a foreign state* for violations of international law had *ever* been cognizable in the courts of this country or, for that matter, in any municipal court anywhere in the world. Third, there was thus no reason for Congress to refer to a non-existing remedy under the Alien Tort Statute when it completely revised the federal doctrine of foreign sovereign immunity in 1976. Fourth, in any event, Congress made it clear beyond peradventure that the FSIA was expressly designed to preempt *all other jurisdictional statutes* when it provided in § 1604 that “a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter” (emphasis added).⁴

Therefore, on the assumption that a dormant jurisdictional provision for suits against foreign sovereigns existed anywhere in the statute books—a provision which, for almost two centuries, no court, scholar or publicist had ever divined—Congress decreed in § 1604 that it should forever remain dormant.

The respondents’ contention that “if Congress wishes to amend the Alien Tort Statute [to exclude suits against foreign sovereigns], it may do so, but it

⁴ The only jurisdictional statute that was explicitly amended by the FSIA was the diversity statute, 28 U.S.C. § 1332. The reference to civil actions against “foreign states” in the pre-FSIA version of § 1332(a) was stricken to ensure that the FSIA became the exclusive jurisdictional predicate for suits against foreign states. Cf. Publ.L. 94-583, October 21, 1976, § 3, 90 Stat. 2891, with 28 U.S.C. § 41(1) (1940 ed.). See, H.R.Rep. No. 94-1457, at 14, reprinted in [1976] U.S. Code Cong. & Admin. News at 6613.

is not the province of the judiciary to rewrite the plain language of the statute” is unsupportable (Br.Opp. 13). The applicable principle is clearly to the contrary: it is not for the court below to read into the language of the Alien Tort Statute a jurisdictional predicate that never existed, and to invite Congress to rewrite the statute if it disapproved of the court’s insensate interpretation.

3. In urging that certiorari be denied, respondents state that “the holding in this case rests on unique facts unlikely to recur” (Br.Opp. at 11). To demonstrate such narrow scope of the decision below, respondents point to an obscure provision in the Merchant Marine Act of 1920, 42 U.S.C. § 877, which permits foreign-flag vessels to carry merchandise between American ports and the U.S. Virgin Islands—an exception to the general prohibition against transportation of merchandise in foreign-flag vessels between points embraced within the “coastwise laws” of the United States. Under this statutory exception, the Liberian-flag tanker that was lost here could lawfully carry oil between Alaska and the U.S. Virgin Islands.

Respondents state that only recently the Commission on Merchant Marine and Defense recommended that the President consider closing the U.S. Virgin Islands “loophole” (*ibid.*); in consequence, there is a possibility that in the future foreign-flag vessels will not be permitted to carry merchandise between U.S. ports and the Virgin Islands.

But the holding below is not limited to suits against foreign states by aliens engaged in the carriage of goods between U.S. ports. The court below held broadly “that attacking a neutral ship in international

waters, without proper cause for suspicion or investigation, violates international law" (Pet.App. 7a), and that since such a violation was alleged here, "the Alien Tort Statute provides jurisdiction" (*id.*, at 10a).

The breadth of the lower court's holding belies respondents' claim that the decision below is of narrow compass. More importantly, the Solicitor General's *amicus* brief manifests to the Court that subjecting foreign states to the jurisdiction of United States courts under circumstances, as here, "could have serious adverse consequences for the Nation's foreign relations and could expose the United States to reciprocal action in the courts of other nations" (U.S. Br. *amicus curiae* at 2). The implications of the holding below are such as to necessitate review by this Court.

Therefore, the petition for a writ of certiorari should be granted.

Respectfully submitted,

BRUNO A. RISTAU

Counsel of Record

KAPLAN RUSSIN & VECCHI

1215 Seventeenth Street, N.W.

Washington, D.C. 20036

(202) 887-0353

Attorney for the Petitioner

March 30, 1988.

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No. 87-1372

FILED

NOV 18 1988

JOSEPH E. SPANIOLO, JR.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE
SUPPORTING PETITIONER

CHARLES FRIED

Solicitor General

JOHN R. BOLTON

Assistant Attorney General

LOUIS R. COHEN

Deputy Solicitor General

EDWIN S. KNEEDLER

*Assistant to the Solicitor
General*

DAVID EPSTEIN

MICHAEL JAY SINGER

Attorneys

Department of Justice

Washington, D.C. 20530

(202) 633-2217

ABRAHAM D. SOFAER

Legal Adviser

ELIZABETH G. VERVILLE

Deputy Legal Adviser

DANIEL WOLF

Attorney

Department of State

Washington, D.C. 20520

QUESTION PRESENTED

The United States will address the following question:

Whether a federal district court has jurisdiction under the Alien Tort Statute, 28 U.S.C. 1350, over a suit brought by a foreign corporation against a foreign state for a tort allegedly committed on the high seas in violation of international law, where the foreign state is immune from the jurisdiction of the courts of the United States under the Foreign Sovereign Immunities Act (FSIA).

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*ON PETITION FOR A WRIT OF CERTIORARI
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FOR THE SECOND CIRCUIT*

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE
SUPPORTING PETITIONER**

INTEREST OF THE UNITED STATES

Respondents brought this suit seeking money damages for losses sustained as a result of an attack by military aircraft of petitioner Argentine Republic on a tanker owned by respondent United Carriers, a Liberian Corporation, when the tanker was on the high seas in the South Atlantic during the war between Great Britain and Argentina regarding the Falkland (Malvinas) Islands. Under the Foreign Sovereign Immunities Act (FSIA), petitioner Argentine Republic is immune from the jurisdiction of the courts of the United States and the States with respect to any suit arising out of that incident, because neither the acts alleged nor the damage to property occurred in the United States. The court of appeals held, however, that irrespective of any immunity mandated by the FSIA, respondents may bring this action against Argentina for damages under the Alien Tort Statute, 28 U.S.C. 1350, which provides that the district courts shall have jurisdiction over any suit by an alien for a tort in violation of the Law of Nations. This holding is clearly wrong,

because the FSIA, by its terms, is the exclusive means for determining when a United States court may exercise jurisdiction over a suit against a foreign state.

The United States has a substantial interest in the proper interpretation of the FSIA, because the implementation of the FSIA by the courts may affect the foreign relations of the United States. The FSIA was enacted in 1976 to codify what Congress and the President found to be the appropriate principles of international law regarding the circumstances in which one sovereign state should be immune from the jurisdiction of the courts of another sovereign state. Therefore, when a United States court refuses to accord a foreign state the immunity to which it is entitled by the FSIA, the court departs from the principles of international law that have been formally adopted by the political Branches. Moreover, the holding of the court of appeals in this case threatens to open the courts of the United States to aliens (but not U.S. citizens) who seek damages for alleged violations of international law by foreign governments—even where the underlying dispute has no nexus to the United States. Subjecting foreign states to the jurisdiction of the courts of the United States in such cases could have serious adverse consequences for the Nation's foreign relations and could expose the United States to reciprocal action in the courts of other nations. The United States has a substantial interest in preventing those consequences.

STATEMENT

1. The petition for a writ of certiorari in this case arises out of two consolidated suits seeking damages from petitioner Argentine Republic for the loss of a crude oil tanker named the *Hercules*. Respondent United Carriers, Inc., a Liberian corporation, was the owner of the *Hercules*. Respondent Amerada Hess Shipping Corp., also a Liberian corporation, had chartered the *Hercules* to transport crude oil from Valdez, Alaska, to an oil refinery in the Virgin Islands. Because the ship was too large to pass through the Panama Canal, it sailed between these two points by travelling around the southern tip of South America, at Cape Horn. Pet. App. 3a, 26a-27a.

On May 25, 1982, the *Hercules* began a return voyage, without cargo, from the Virgin Islands to Valdez. At that time, Argentina and Great Britain were at war over the Falkland (Malvinas) Islands. On June 8, 1982, while the *Hercules* was on the high seas in the South Atlantic, and allegedly was outside any claimed "war zones" designated by Argentina and Great Britain, it was attacked by Argentine military aircraft. The decks and hull of the ship were damaged, and an undetonated bomb lodged in her starboard side. Respondent United Carriers decided that it would be too dangerous to attempt to remove the undetonated bomb, and the ship therefore was scuttled off the coast of Brazil. Pet. App. 4a, 27a-28a.

2. Respondents filed suit in the United States District Court for the Southern District of New York seeking money damages from petitioner Argentine Republic for the injuries they sustained as a result of the attack.¹ Respondents alleged that petitioner's attack on the neutral vessel violated established norms of international law, and they invoked the jurisdiction of the district court under the Alien Tort Statute, 28 U.S.C. 1350, which provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." Pet. App. 28a, 36a, 38a, 39a, 41a.

The district court granted petitioner's motion to dismiss the complaint, holding that respondents' suits are barred by the Foreign Sovereign Immunities Act of 1976 (FSIA).² See Pet. App. 25a-35a. In enacting the FSIA, Congress rejected the rule of absolute immunity for foreign sovereigns that had been recognized since the earliest days of the Nation (see *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812)), and instead codified the "restrictive" theory of

¹ Respondent United Carriers sought \$10 million in damages for the loss of the ship, and respondent Amerada Hess sought \$1.9 million in damages for the loss of fuel that went down with the ship. Pet. App. 4a.

² Pub. L. No. 94-583, 90 Stat. 2891 (codified at 28 U.S.C. 1330, 1391(f), 1602 et seq.).

sovereign immunity that was followed by many other nations and had been adopted by the Executive Branch in 1952 in the so-called Tate Letter. Under the restrictive theory, a foreign state is immune from suit for its sovereign or public acts, but not for its commercial or private acts. 28 U.S.C. 1602; see *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486-489 (1983); H.R. Rep. 94-1487, 94th Cong., 2d Sess. 8-9, 14 (1976); S. Rep. 94-1310, 94th Cong., 2d Sess. 9, 10 (1976).

In the district court's view, Congress was "emphatic" in its purpose that "the FSIA be the sole means of assessing claims of immunity" by a foreign state (Pet. App. 29a). The court found this congressional purpose "apparent" from the text of the Act, which provides that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter" (Pet. App. 29a (quoting 28 U.S.C. 1604)),¹ and from the legislative history, which states that the FSIA "sets forth the sole and exclusive standards to be used in resolving questions of sovereign immunity raised by foreign states before Federal and State courts" (*id.* at 29a, quoting H.R. Rep. 94-1487, 94th Cong., 2d Sess. 12 (1976)). Looking then to the exclusive standards of the FSIA, the district court concluded that "[respondents'] claims undeniably fall outside of the exceptions to blanket foreign sovereign immunity provided by the FSIA" (Pet. App. 30a). The court reasoned that in order for a foreign state to be denied immunity from a suit sounding in tort, the FSIA "requires that the 'damage to or loss of property' occur 'in the United States'" (*ibid.*, quoting 28 U.S.C. 1605(a)(5)); yet in this case, respondents "can claim no loss whatsoever occurring in the United States" (Pet. App. 30a).

The district court also rejected respondents' contention that the Alien Tort Statute "provides the basis for jurisdiction that the FSIA denies" (Pet. App. 31a). The court noted that "[n]o case law supports the assertion that a foreign sovereign state

¹ Section 1604 makes this general conferral of immunity "[s]ubject to existing international agreements to which the United States is a party at the time of enactment of [the FSIA]." As explained below, this exception is inapplicable here. See note 6, *infra*.

would not have enjoyed immunity in 1789," when the Alien Tort Statute was enacted (*id.* at 31a-32a). But the court found that even if a foreign sovereign could have been sued under the Alien Tort Statute if that Statute were considered in isolation, the FSIA now confers sovereign immunity on a foreign state as regards any such suit unless the suit falls with one of the exceptions to immunity under the FSIA (*id.* at 32a-33a). The court stressed that its conclusion was not based on the premise that the enactment of the FSIA in 1976 had effected a "repeal" of the Alien Tort Statute. In the court's view, because the Alien Tort Statute "speaks in terms of plaintiffs and causes of action" and "is utterly silent as to classes of defendants," the FSIA merely "narrows the class of defendants" who might otherwise be sued under the Alien Tort Statute, just as it does with respect to the defendants who might be sued under the other jurisdictional provisions in the Judicial Code (*ibid.*).

3. a. A divided panel of the court of appeals reversed and remanded for further proceedings (Pet. App. 1a-21a). The court of appeals held that the district court has jurisdiction over the case under the Alien Tort Statute (*id.* at 7a-10a), because the suit is brought by aliens (the respondent Liberian corporations), it sounds in tort ("the bombing of a ship without justification"), and it alleges what the court found to be a violation of international law ("attacking a neutral ship in international waters, without proper cause for suspicion or investigation") (*id.* at 7a-8a). The court acknowledged petitioner Argentina's submission that the Alien Tort Statute provides jurisdiction only over suits against individuals, not sovereign states, because the United States recognized absolute sovereign immunity for foreign states in 1789, when the Statute was enacted. But the court found it unnecessary to decide whether a court faced with the circumstances of this case in 1789 would have exercised jurisdiction over a foreign state. In the court's view, the Alien Tort Statute "is no more than a jurisdictional grant based on international law," and "[i]n construing the Alien Tort Statute, 'courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world

today' " (*id.* at 8a-9a, quoting *Filartiga v. Pena-Irala*, 630 F.2d 876, 881 (2d Cir. 1980)). Accordingly, the court concluded that it "must look to modern international law to decide whether the statute provides jurisdiction over a foreign sovereign" (Pet. App. 9a). Citing two law review articles, the court concluded that the "modern view" is that sovereigns are not immune from suit for their violations of international law (*ibid.*).

The court rejected Argentina's contention that, regardless of whether the Alien Tort Statute, standing alone, would have provided a basis for jurisdiction in this case, the FSIA is now the exclusive basis for obtaining jurisdiction over foreign sovereigns (Pet. App. 9a-10a). In so doing, the court noted the legislative history stating that the FSIA "sets forth the sole and exclusive standards to be used in resolving questions of sovereign immunity" (*id.* at 11a (quoting H.R. Rep. 94-1487, *supra*, at 12)), the Second Circuit's own prior conclusion that the FSIA "insulates foreign states from the exercise of federal jurisdiction, except under the conditions specified in the Act" (Pet. App. 11a, quoting *O'Connell Machinery Co. v. M.V. Americana*, 734 F.2d 115, 116 (2d Cir.), cert. denied, 469 U.S. 1086 (1984)), and this Court's "similar views" in *Verlinden* (Pet. App. 11a, citing 461 U.S. at 496-497). But the court chose not to follow those pronouncements in this case, because it believed that "Congress was not focusing on violations of international law when it enacted the FSIA" and therefore "did not intend to remove existing remedies in United States courts [under the Alien Tort Statute] for violations of international law of the kind presented here" (Pet. App. 11a). Indeed, the court believed that to construe the FSIA to bar this suit against a foreign state under the Alien Tort Statute would actually frustrate Congress's purpose in enacting the FSIA, because the "central premise" of the FSIA was that "decisions on claims by foreign states to sovereign immunity are best made by the judiciary on the basis of a statutory regime which incorporates standards recognized under international law" (*id.* at 13a, quoting H.R. Rep. 94-1487, *supra*, at 14 (emphasis added by the court)).⁴

⁴ The court of appeals also held that the actions of Argentina alleged by respondents were "sufficiently related" to the United States to fall within

b. Judge Kearse dissented (Pet. App. 18a-21a). Judge Kearse expressed skepticism that the Alien Tort Statute was "intended to allow federal subject-matter jurisdiction to ebb and flow with the vicissitudes of 'evolving standards of international law'" (*id.* at 19a (citation omitted)). But however that may be, she concluded, the majority had improperly disregarded the "clearly restrictive provisions" of the FSIA, which, in her view, were "intended to preempt any other State or Federal law (excluding applicable international agreements) for according immunity to foreign sovereigns" (*ibid.* (quoting H.R. Rep. 94-1487, *supra*, at 12)).

ARGUMENT

The decision of the court of appeals is flatly inconsistent with the text and legislative history of the Foreign Sovereign Immunities Act and with this Court's decision in *Verlinden B. V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983), which make clear that the FSIA prescribes the exclusive standards for determining when a foreign state is immune from the jurisdiction of United States courts. The decision below also conflicts with the decisions of other courts of appeals regarding the exclusivity of the FSIA. For these reasons alone, review by this Court is warranted. In addition, however, the decision of the court of appeals may have substantial adverse foreign policy consequences for the United States, because it subjects a foreign state to suit in the courts of this country based on incidents occurring on the high seas in time of war and because it threatens more broadly to open the courts of the United States to claims by aliens against foreign governments where the underlying dispute has no nexus to the United States. Especially in light of these potential foreign relations consequences, we urge the Court to grant the petition for a writ of certiorari.

I. The text and legislative history of the FSIA expressly provide that the FSIA is the exclusive means for assessing claims by

constitutional limitations on the exercise of personal jurisdiction over a foreign defendant (Pet. App. 14a-15a).

foreign states to sovereign immunity from the jurisdiction of the courts of the United States.

a. In the FSIA's statement of findings and declaration of purpose, Congress expressed its determination that "[c]laims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter [28 U.S.C. 1602-1611]." 28 U.S.C. 1602. This statement obviously manifests a congressional intention that, from 1976 on, the provisions of the FSIA would constitute the comprehensive and sole set of standards governing judicial determinations of foreign sovereign immunity.

Consistent with this overriding purpose, Section 1604 states a general and universal rule that foreign states are entitled to immunity, subject only to the exceptions set forth in the FSIA itself. Section 1604 provides that "[s]ubject to existing international agreements to which the United States [was] a party at the time of enactment of this Act[,] a foreign state *shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter*" (emphasis added). Section 1605 in turn specifies in detail the exceptions to this general rule of immunity.³ Section

³ The exceptions are cases: in which the foreign state has waived its immunity (28 U.S.C. 1605(a)(1)); in which the action is based on commercial activities in the United States, an act committed in the United States in connection with commercial activities elsewhere, or commercial activities outside the United States having an effect within (28 U.S.C. 1605(a)(2)); in which property was taken in violation of international law and the property is present in the United States in connection with commercial activity of a foreign state or is owned by an agency or instrumentality of the foreign state that is engaged in commercial activities in the United States (28 U.S.C. 1605(a)(3)); in which the dispute concerns rights in immovable property in the United States that was acquired by gift or succession (28 U.S.C. 1605(a)(4)); and (with certain exceptions) cases in which money damages are sought for personal injury or death, or damage to or loss of property, occurring in the United States and caused by an act or omission of the foreign state or one of its officers or employees acting in his official capacity (28 U.S.C. 1605(a)(5)). In addition, under 28 U.S.C. 1605(b), a foreign state is not immune from suit in an admiralty action to enforce a maritime lien against a vessel or cargo of the foreign state, if the lien is based on commercial activities of that state.

1606 prescribes the extent of a foreign state's liability when it is not entitled to immunity, and Section 1607 permits certain counterclaims against a foreign state that brings an action in a court of the United States or a State.⁴ Sections 1604 to 1607 thus prescribe what Section 1602 presages: a comprehensive and self-contained statutory scheme for the regulation of foreign sovereign immunity.

This interpretation of the substantive immunity provisions of the FSIA is reinforced by the special grant of subject matter jurisdiction in 28 U.S.C. 1330, which is entitled "Actions against foreign states" and was added to the Judicial Code by Section 2(a) of the FSIA, 90 Stat. 2891. Section 1330(a) provides that "[t]he district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state * * * as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement."⁵ Sections 1330(a) and

⁴ Section 1604 also provides that the general rule of immunity is "[s]ubject to existing international agreements to which the United States [was] a party at the time of enactment of [the FSIA] * * *." This exception has no relevance here. It applies only if the international agreement addresses amenability to suit and directly conflicts with the immunity provisions of the FSIA. H.R. Rep. 94-1487, *supra*, at 10, 17-18; S. Rep. 94-1310, *supra*, at 6, 17. Respondents sought to rely on this provision in the court below, citing the Geneva Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, and the Pan American Convention Relating to Maritime Neutrality, Feb. 20, 1928, 47 Stat. 1989. See Appellants' C.A. Br. 41-45. However, those conventions merely establish certain substantive rules of conduct and state that compensation shall be paid for certain wrongs; they do not address the distinct question of one sovereign state's immunity to the jurisdiction of the courts of another sovereign state. Moreover, although the United States is a party to both conventions, Argentina is merely a signatory. We doubt that Section 1604 was intended to dispense with the immunity of a foreign state based on an "agreement" to which the foreign state is not a party.

⁵ Subsection (b) of 28 U.S.C. 1330 provides that "[p]ersonal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have [subject matter] jurisdiction under subsection (a) where service has been made under [28 U.S.C. 1608]." Thus, the existence of both subject

1604 are complementary: Section 1330(a) confers jurisdiction on the federal courts whenever the foreign state *is not* entitled to immunity, and Section 1604 bars the district courts from exercising jurisdiction wherever the foreign state *is* entitled to immunity. These two provisions of the FSIA therefore occupy the entire fields of foreign sovereign immunity and subject matter jurisdiction over suits against foreign states. There is no room in this framework for a court to fashion its own standards of foreign sovereign immunity that depart from those in the FSIA or to exercise jurisdiction over a suit against a foreign state where jurisdiction does not lie under 28 U.S.C. 1330(a).

It is clear in this case that petitioner Argentine Republic is immune from suit under 28 U.S.C. 1604 and that jurisdiction over this action therefore does not lie under 28 U.S.C. 1330(a). As the district court held (Pet. App. 30a-31a), none of the exceptions in 28 U.S.C. 1605 to the general rule of sovereign immunity is applicable here. There is only one exception permitting suits sounding in tort, and that exception is limited to actions "in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States" (28 U.S.C. 1605(a)(5) (emphasis added)).⁹ Because the damage to and loss of property that

matter and personal jurisdiction turn on the substantive immunity provisions of the Act. *Verlinden*, 461 U.S. at 485, 489 & n. 14. Although the FSIA contemplates that a suit may be brought against a foreign sovereign in state court, the FSIA guarantees foreign sovereigns the right to remove any civil action from a state court to a federal court. *Id.* at 489; see 28 U.S.C. 1441(d).

⁹ The legislative history of the FSIA further indicates that the tort exception applies only if the act or omission of the foreign state or its officer or employee occurred within the jurisdiction of the United States. See H.R. Rep. 94-1487, *supra*, at 21; S. Rep. 94-1310, *supra*, at 20. Several courts of appeals have interpreted this legislative history to require that the act or omission occur in the United States. See *Prolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 379 (7th Cir. 1985); *Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517, 1524-1525 (D.C. Cir. 1984), cert. denied, 470 U.S. 1051 (1985); *Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 842-843 (D.C. Cir.), cert. denied, 469 U.S. 881 (1984); cf. *Olson v. Government of Mexico*, 729 F.2d 641, 645-646 (9th Cir.), cert. denied, 469 U.S. 917 (1984); *McKeel v. Islamic Republic of Iran*, 722 F.2d 582, 589-590 n.10 (9th Cir. 1983), cert. denied, 469

respondents allege occurred outside the United States—on the high seas, in the South Atlantic—the exception in 28 U.S.C. 1605(a)(5) is inapplicable. Petitioner Argentine Republic therefore is entitled to the immunity from the jurisdiction of the courts of the United States that is conferred by 28 U.S.C. 1604.

b. The legislative history is equally unambiguous. The House and Senate Reports both state that the FSIA "sets forth the sole and exclusive standards to be used in resolving questions of sovereign immunity raised by foreign states before Federal and State courts in the United States," and that the FSIA "is intended to preempt any other State or Federal law (excluding applicable international agreements) for according immunity to foreign sovereigns, their political subdivisions, their agencies, and their instrumentalities" (H.R. Rep. 94-1487, *supra*, at 12; S. Rep. 94-1310, *supra*, at 11). The House and Senate Reports also make clear that "Section 1330 provides a comprehensive jurisdictional scheme in cases involving foreign states," which is essential because disparate treatment "may have adverse foreign relations consequences" (H.R. Rep. 94-1487, *supra*, at 12-13; S. Rep. 94-1310, *supra*, at 12). Similar points are stressed throughout the legislative history.⁹

U.S. 880 (1984). See also *Verlinden*, 461 U.S. at 488 n.11 (referring to 28 U.S.C. 1605(a)(5) as providing an exception "for certain noncommercial torts within the United States").

⁹ See S. Rep. 94-1310, *supra*, at 1 (the FSIA "define[s] the jurisdiction of United States courts in suits against foreign states, [and] the circumstances in which foreign states are immune from suit"); *id.* at 8 (the purpose of the FSIA "is to provide when and how parties can maintain a lawsuit against a foreign state or its entities in the courts of the United States and to provide when a foreign state is entitled to sovereign immunity"); *ibid.* (prior to enactment of the FSIA, there were no "comprehensive provisions in our law available to inform parties when they can have recourse to the courts to assert a legal claim against a foreign state" and no "firm standards as to when a foreign state may validly assert the defense of sovereign immunity"); *id.* at 12 (the FSIA "set[s] forth comprehensive rules governing sovereign immunity" and "prescribes . . . the jurisdiction of U.S. district courts in cases involving foreign states"); *id.* at 14 (the FSIA "sets forth the legal standards under which Federal and States courts would henceforth determine all claims of sovereign immunity raised by foreign states"). Accord, H.R. Rep. 94-1487, *supra*, at 1, 6, 7, 14.

c. The court of appeals' attempt to justify the exercise of jurisdiction under the Alien Tort Statute in circumstances where petitioner is immune from suit under the FSIA is completely without merit. Indeed, the court of appeals acknowledged that the legislative history of the FSIA, this Court's decision in *Verlinden*, and its own prior decision in *O'Connell* all support the view that the FSIA is "the sole basis for United States jurisdiction over foreign sovereigns" (Pet. App. 11a). The court concluded, however, that because the FSIA provides exceptions to sovereign immunity primarily for commercial disputes, "Congress was not focusing on violations of international law when it enacted the FSIA" (*ibid.*). The court therefore decided that the FSIA should not be construed to remove what the court found to be a pre-existing remedy under the Alien Tort Statute for violations of international law.

The first flaw in this analysis is the court of appeals' assumption that, at the time the FSIA was enacted, the Alien Tort Statute provided a remedy against a foreign state. As the district court pointed out (Pet. App. 32a), the Alien Tort Statute makes no mention of foreign states, or indeed of any other class of defendants. It simply refers to plaintiffs and the nature of the cause of action over which the district courts have jurisdiction. In light of this Court's decision in *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812), holding that a foreign sovereign was absolutely immune from suit in the courts of the United States, it seems clear that a foreign state would not have been subject to suit under the Alien Tort Statute when it was enacted in 1789. In fact, the court of appeals did not cite any case decided prior to the enactment of the FSIA in which a court exercised jurisdiction under the Alien Tort Statute over an in personam action against a foreign sovereign, and we are not aware of any such case.¹⁰ There accordingly is no basis for concluding that Congress must have intended to preserve a remedy that had never been recognized by the courts. Compare

¹⁰ The only case in which jurisdiction was exercised over a foreign state under the Alien Tort Statute was decided long after the FSIA was enacted. *Von Dardel v. Union of Soviet Socialist Republics*, 623 F. Supp. 246 (D.D.C. 1985) (default judgment; alternative holding).

Merrill Lynch, Pierce, Fenner & Smith v. Curran, 456 U.S. 353, 378-382 (1982).¹¹

¹¹ On a related issue not before the Court, the United States has argued that the Alien Tort Statute was not intended to authorize the courts of the United States to recognize and entertain causes of action by aliens based on violations of the law of nations committed by citizens of foreign nations (much less by the foreign nations themselves) outside the United States. Section 1350 confers jurisdiction over actions for torts in violation of "the law of nations or a treaty of the United States." The United States has argued in its amicus brief in *Tra-jano v. Marcos*, No. 86-2448, which is pending in the Ninth Circuit, that Section 1350 was intended to confer jurisdiction over cases seeking redress for violations of the law of nations for which other nations might regard the United States as accountable and which therefore might embroil the United States in an international controversy if redress was not afforded. Such violations would principally include those committed in the United States (e.g., the celebrated incident of an assault on the French Minister discussed in *Respublica v. De Longchamps*, 1 U.S. (1 Dall.) 111 (Pa. Oyer & Terminer 1784); compare 18 U.S.C. 112) and perhaps certain violations committed outside the United States but by persons subject to its jurisdiction. Under this construction, an assault by a British citizen on the French Minister in Great Britain (or an attack by a foreign nation on a neutral ship on the high seas) would not give rise to a cause of action cognizable in the federal courts under the Alien Tort Statute, because the incident would not give rise to any international responsibility on the part of the United States.

This interpretation of the Alien Tort Statute is supported by the background of the Law of Nations Clause of the Constitution, which confers on Congress the power to "define and punish . . . Offences against the Law of Nations" (Art. I, § 8, Cl. 10). This provision was included in the Constitution in response to the absence of any power in the Continental Congress to punish offenses against the Law of Nations and thereby to prevent incidents by the States or their people from embroiling the Nation with foreign nations. See *The Federalist* No. 3 (Jay), at 43-44 (C. Rossiter ed. 1961); *id.*, No. 42 (Madison), at 265; cf. *id.*, No. 80 (Hamilton), at 476. This interpretation also is supported by the text of 28 U.S.C. 1350 itself, which provides jurisdiction over suits based on a tort "committed in violation of . . . a treaty of the United States" (emphasis added). The quoted language suggests that a suit will lie only where there is an alleged violation of an international obligation undertaken by the United States.

The United States also has taken the position in the *Tra-jano* case in the Ninth Circuit that because the Alien Tort Statute (like the federal question statute) is only jurisdictional in nature, it does not create a cause of action in favor of an alien for a violation of the law of nations. In this case, there is a serious question whether a federal court may properly "imply" such a cause of action against a foreign sovereign based on conduct that occurred outside the United

In any event, even if respondents might have had a cause of action against petitioner under the Alien Tort Statute prior to the enactment of the FSIA in 1976, the text and legislative history of the FSIA now make clear, as we have explained above, that the FSIA is the exclusive basis for the exercise of jurisdiction and resolution of claims of sovereign immunity.¹² The court of appeals nevertheless believed that the Alien Tort Statute should continue as an independent basis of jurisdiction because Congress did not focus on violations of international law when it enacted the FSIA (Pet. App. 11a). However, the lack of specific discussion of one subpart of a subject in the legislative history is no basis for excluding that subpart from the coverage of a statute that is both written and described in its legislative history in all-embracing terms.

Moreover, the court of appeals was wrong in believing that Congress did not focus on violations of international law. The FSIA expressly provides an exception to the rule of foreign sovereign immunity where the suit involves rights in property that was taken "in violation of international law" (28 U.S.C.

States. See *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 801-808 (D.C. Cir. 1984), cert. denied, 470 U.S. 1003 (1985) (Bork, J. concurring). The Second Circuit, however, took an expansive view of the reach of the Alien Tort Statute in *Filartiga v. Pena-Irala*, 630 F.2d 876 (1980), upon which the Second Circuit relied in this case (Pet. App. 5a, 7a-8a). Although the United States filed an amicus brief in support of the plaintiffs in *Filartiga*, the United States has taken the position in *Trajano* that the plaintiffs in *Filartiga* did not have a cause of action cognizable under the Alien Tort Statute.

¹² The language of 28 U.S.C. 1330(a) makes it especially clear that it comprehensively addresses the question of subject matter jurisdiction over suits against foreign states, because it confers jurisdiction on the district courts over "any . . . civil action against a foreign state" for which the foreign state is not entitled to immunity (emphasis added). Indeed, precisely because of the all-encompassing scope of the new 28 U.S.C. 1330(a), the FSIA deleted the references to "foreign states" that then were contained in the diversity statute, 28 U.S.C. (1970 ed.) 1332(a)(2) and (3). FSIA, § 3, 90 Stat. 2891. As the House Report explained, "[s]ince jurisdiction in actions against foreign states is comprehensively treated by the new section 1330, a similar jurisdictional basis under section 1332 becomes superfluous" (H.R. Rep. 94-1487, *supra*, at 14; accord, S. Rep. 94-1310, *supra*, at 10). There is no reason to believe that Congress contemplated a different result with respect to the Alien Tort Statute.

1605(a)(3)). Congress's express provision for certain suits based on violations of international law indicates that other such suits that are not expressly permitted are barred. Cf. *United States v. Erika, Inc.*, 456 U.S. 210, 208 (1982). There is no reason to suppose that Congress would have intended any other result in the circumstance of this case, because the action of the military forces of a foreign state, even if in violation of international law, are unquestionably sovereign or public acts, for which the state is immune from suit. *Victory Transport, Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354, 360 (2d Cir. 1964), cert. denied, 381 U.S. 934 (1954).

In addition, as this Court observed in *Verlinden* (461 U.S. at 493 n.19), when it enacted the comprehensive provisions of the FSIA, Congress relied in part on its authority under the Constitution to define offenses against the "Law of Nations" (Art. I, § 8, Cl. 10). See H.R. Rep. 94-1487, *supra*, at 12. It follows that Congress intended the FSIA to be comprehensive with respect to suits against foreign states based on violations of the Law of Nations (international law), and did not intend to permit different jurisdictional and immunity rules to be applied in a suit for a violation of the "law of nations" under 28 U.S.C. 1350.

This case therefore is directly analogous to *Block v. North Dakota*, 461 U.S. 273 (1983), which involved a question of the sovereign immunity of the United States to suit. There, the Court held that whatever the uncertainty prior to the 1972 enactment of the Quiet Title Act (QTA), 28 U.S.C. 2409a, regarding the availability of an "officer's suit" or review under the Administrative Procedure Act to challenge the United States' claim of title to real property, the QTA is now the exclusive avenue for such challenges. Otherwise, the Court observed, "all of the carefully crafted provisions of the QTA deemed necessary for the protection of the national public interest"—including the provisions of the QTA that preserve the United States' sovereign immunity against certain suits—"could be averted" (461 U.S. at 284-285). Similarly here, if the FSIA does not displace whatever jurisdiction might once have existed under the Alien Tort Statute over suits against foreign states, all

of the carefully crafted provisions of the FSIA that preserve the sovereign immunity of foreign states could be averted.

2. Consistent with the text and legislative history of the FSIA, this Court in *Verlinden* explained that the FSIA "contains a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities" (461 U.S. at 488 (emphasis added)) and that "if a court determines that none of the exceptions to sovereign immunity applies, the plaintiff will be barred from raising his claim in any court in the United States" (*id.* at 497).¹³ The decision of the court of appeals cannot be reconciled with *Verlinden*.

The other courts of appeals likewise have taken the position that the FSIA contains the exclusive standards for resolving claims of sovereign immunity by foreign states. See, e.g., *MacArthur Area Citizens Ass'n v. Republic of Peru*, 809 F.2d 918, 919 (D.C. Cir. 1987); *Jackson v. People's Republic of China*, 794 F.2d 1490, 1493 (11th Cir. 1986), cert. denied, No. 86-909 (Mar. 9, 1987); *City of Englewood v. Socialist People's Libyan Arab Jamahiriya*, 773 F.2d 31, 35 (3d Cir. 1985); *Yugoexport, Inc. v. Thai Airways International, Ltd.*, 749 F.2d 1373, 1375 (9th Cir. 1984), cert. denied, 471 U.S. 1101 (1985); *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370,

¹³ Similar observations pervade the Court's opinion in *Verlinden*. See 461 U.S. at 489 ("if the claim does not fall within one of the exceptions, federal courts lack subject-matter jurisdiction"); *id.* at 493 (the FSIA "comprehensively regulat[es] the amenability of foreign nations to suit in the United States"); *id.* at 493-494 ("The [FSIA] must be applied by the district courts in every action against a foreign sovereign, since subject-matter jurisdiction in any such action depends on the existence of one of the specified exceptions to foreign sovereign immunity, 28 U.S.C. § 1330(a). At the threshold of every action in a district court against a foreign state, therefore, the court must satisfy itself that one of the exceptions applies – and in doing so it must apply the detailed federal law standards set forth in the Act."); *id.* at 495 n.22 (quoting H.R. Rep. 94-1487, *supra*, at 12 ("the Act's purpose is to set forth 'comprehensive rules governing sovereign immunity'")); *id.* at 496 (same); *ibid.* ("[T]he jurisdictional provisions of the Act are simply one part of this comprehensive scheme."); *id.* at 496-497 ("The Act thus does not merely concern access to the federal courts. Rather, it governs the types of actions for which foreign sovereigns may be held liable in a court in the United States, federal or state.");

372 (7th Cir. 1985). In fact, the Second Circuit had adhered to that view prior to its decision in this case. See, e.g., *O'Connell Machinery Co. v. M.V. Americana*, 734 F.2d at 116. Moreover, the other courts of appeals that have considered the question have uniformly held that a plaintiff cannot circumvent the limitations in the FSIA on suits against a foreign sovereign by invoking jurisdictional provisions other than 28 U.S.C. 1330(a), such as the grants of federal-question and diversity jurisdiction in 28 U.S.C. 1331 and 1332. *Goar v. Compania Peruana de Vapores*, 688 F.2d 417, 420-422 (5th Cir. 1982); *REX v. CIA. Pervana de Vapores, S.A.*, 660 F.2d 61, 64-65 (3d Cir. 1981); *Williams v. Shipping Corp. of India*, 653 F.2d 875, 881 (4th Cir. 1981), cert. denied, 455 U.S. 982 (1982); *Ruggiero v. Compania Peruana de Vapores*, 639 F.2d 872, 875-876 (2d Cir. 1981). And of particular relevance here, the District of Columbia Circuit held in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (1984), cert. denied, 470 U.S. 1003 (1985), that the FSIA barred the district court from exercising jurisdiction over a tort suit against a foreign sovereign, even though the plaintiffs invoked the district court's jurisdiction under the Alien Tort Statute. See 726 F.2d at 776 n.1 (Edwards, J., concurring); *id.* at 805 n.13 (Bork, J., concurring). The conflict between the decision below and the decisions of other courts of appeals regarding the exclusivity of the FSIA warrants resolution by this Court.

3. The decision of the court of appeals could have a substantial adverse impact on the foreign relations of the United States. The courts of the United States are not the proper forums for the resolution of the legality of acts of foreign states, except to the extent permitted by controlling laws of the United States – here, the FSIA, in which Congress defined and codified what it regarded as the appropriate standards of the international law of sovereign immunity. The United States does not condone violations of international law, and the United States takes the position that petitioner Argentine Republic should take responsibility for any such violations that it committed in its territory or on the high seas during the war with Great Britain. But sensitive foreign policy concerns are implicated by the

court of appeals' holding that the courts of the United States may assume responsibility for determining whether such a violation occurred in this case and for awarding damages against petitioner ~~if~~ ~~finds~~ a violation. *is found*.

The decision below not only has the extraordinary effect of requiring petitioner to answer to the courts of a neutral third party regarding its conduct during a time of war.¹⁴ It also threatens to turn the courts of the United States into tribunals in which aliens generally (but not U.S. citizens) may seek redress against foreign governments for conduct that has no substantial nexus to the United States. As this Court observed in *Verlinden*, "Congress was aware of concern that 'our courts [might be] turned into small "international courts of claims[,] . . . open . . . to all comers to litigate any dispute which any private party may have with a foreign state anywhere in the world.'" 461 U.S. at 490 (citation omitted). And as this Court further observed, "Congress protected against this danger * * * by enacting substantive provisions requiring some form of substantial contact with the United States. See 28 U.S.C. § 1605." 461 U.S. at 490 (footnote omitted). The court of appeals failed to respect those substantive limitations here. In addition, the assertion of jurisdiction against a foreign state in these circumstances will expose the United States to charges by foreign governments that such action is inconsistent with the international law and practice of sovereign immunity. Such proceedings could result in retaliatory actions against the United States in the Courts of other Nations.

¹⁴ It is instructive that the United States would be immune from a suit in its own courts seeking money damages for the conduct at issue here. The Federal Tort Claims Act expressly does not permit a suit based on "[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war" (28 U.S.C. 2680(j)). It is implausible to suppose that Congress nevertheless intended to subject a foreign nation to such suits in the courts of the United States.

CONCLUSION

The petition for a writ of certiorari should be granted.
Respectfully submitted.

CHARLES FRIED
Solicitor General
JOHN R. BOLTON
Assistant Attorney General
LOUIS R. COHEN
Deputy Solicitor General
EDWIN S. KNEEDLER
Assistant to the Solicitor General
DAVID EPSTEIN
MICHAEL JAY SINGER
Attorneys

ABRAHAM D. SOFAER
Legal Adviser
ELIZABETH G. VERVILLE
Deputy Legal Adviser
DANIEL WOLF
Attorney
Department of State

MARCH 1988

(5)
No. 87-1372

Supreme Court, U.S.

FILED

JUN 30 1988

JOSEPH F. SPANIOLO, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

THE ARGENTINE REPUBLIC,

Petitioner,

vs.

AMERADA HESS SHIPPING CORPORATION, *et al.*,

Respondents.

On Writ of Certiorari to The United States
Court of Appeals for The Second Circuit

JOINT APPENDIX

DOUGLAS R. BURNETT*

RICHARD H. WEBBER

HILL RIVKINS CAREY

LOESBERG O'BRIEN & MULROY

21 West Street

New York, New York 10006

(212) 825-1000

BRUNO A. RISTAU*

JOEL E. LEISING

KAPLAN RUSSIN & VECCHI

1215 Seventeenth St., N.W.

Washington, D.C. 20036

(202) 887-0353

Counsel for Petitioner

RAYMOND J. BURKE, JR.*

FRANCES C. PETERS

BURKE & PARSONS

1114 Avenue of the Americas

New York, New York 10036

(212) 354-3800

Counsel for the Respondents

**Counsel of Record*

PETITION FOR CERTIORARI FILED FEBRUARY 16, 1988
CERTIORARI GRANTED APRIL 18, 1988

115 pp
foldout

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**DOCKET ENTRIES—DISTRICT COURT
(Amerada Hess Shipping)**

Plaintiff

AMERADA HESS SHIPPING CORPORATION

Defendant

ARGENTINE REPUBLIC

DIST:	208
OFF:	01
DOCKET:	Yr. 85 Number 4365
FILING DATE:	Mo.0 6 Day 7 Year 85
J	3
N/S	890
O	1
\$ DEMAND	
Nearest \$1,000	2,000
JUDGE MAG NO.	J 0857
COUNTY:	36061
DOCKET:	Yr. 85 Number 4365

Cause

(CITE THE U.S. CIVIL STATUTE UNDER WHICH THE CASE IS
FILED AND WRITE A BRIEF STATEMENT OF CAUSE)

28 USC 1350. Violation of International Law in that Argentine military forces attacked the S/T Hercules, a neutral merchant ship, on the high seas without provocation or warning.

Attorneys

BY: HILL, RIVKINS, CAREY,
 LOESBERG, O'BRIEN &
 MULROY
 21 West Street
 New York, NY 10006
 825-1000

MINISTRY OF FOREIGN
 AFFAIRS
 3 East Arenales 761
 Buenos Aires 1061
 Argentina

KAPLAN RUSSIN
 VECCHI & KIRKWOOD
 28 W 44th St Suite 200
 N.Y.C. 10036
 869-4350

Date	Filing Fees Paid	Statistical Card
07 Jun 1985	Re. Number 10-8869	Card-Date Issued: 5-9-86

PROCEEDINGS

Date	NR.	85 Civ. 4365	Judge Carter
6-7-85	1	Filed complaint; issued summons and notice purs. to 28 USC 636(c).	
6-26-85	2	Filed Clerk's Certificate of Mailing of summons and complaint upon: Mr. Dante Caputo LIC. Minister of Foreign Affairs Ministry of Foreign Affairs Reconquista 1088 Buenos Aires, Argentina 1003 reg. #206319996 ret. 7-4-85	
8-8-85	3	Filed Stip & Order that the time for deft to respond to Summons & Compl't is ext. to 9-16-85 .. So Ordered .. Carter, J.	
9-13-85	4	Filed defts Notice of Motion & Memo of Law for an order to dismiss action .. RET: 9-27-85.	
9-30-85	5	Filed Stip that pl'tffs time to respond to defts motion is ext to 10-15-85 ... So Ordered .. Carter, J.	
9-30-85	6	Filed Stip that the time for pl'tffs to respond to defts Motion papers is ext to 10-15-85 .. hearing date for motion adj. to 10-25-85 .. So Ordered .. Carter, J.	
10-17-85	7	Filed Stip that the time for pl'tffs to respond to deft's motion papers is ext to 10-21-85 .. hearing date for motion is adj. to 11-1-85 .. So Ordered .. Carter, J.	
11-15-85	8	Filed pl'tffs Affdvt of Douglas R. Burnett in opposition to deft's motion to dismiss.	
11-15-85	9	Filed Joint memorandum of law in opposition to deft's motion to dismiss.	

- 12-6-85 10 Filed deft's response to plttfs' jt memo of law in opposition to deft's motion to dismiss.
- 5-5-86 11 Filed Opinion #59270 . . defts' motions must be granted . . complts are dismissed . . So Ordered . . Carter, J. cm (filed in 85 civ 4378RLC)
- 5-9-86 12 Filed Judt that complt is dismissed. EOD 5-9-86 cm
- 5-20-86 13 Filed plttfs affdvts & Notice of Motion for an order to amend the court's findings. (filed in 85 civ 4378RLC) RET: 6-19-86
- 5-20-86 14 Filed plttfs Memo of law in support of its motion to amend. (filed in 85 civ 4378RLC)
- 5-22-86 15 Filed plttfs Jt Memo of law in support of its motion. (filed in 85 civ 4378RLC)
- 6-23-86 16 Filed deft's reply to plttfs' jot motion under rule 52(b). (filed in 85 civ 4378RLC)
- 6-25-86 — Filed Memo Endorsed on #13 . . motion denied . . So Ordered . . Carter, J. cm (filed in 85 civ 4378RLC)
- 7-23-86 17 Filed plttfs Notice of Appeal to the USCA 2nd cir from the judgt dtd 5-9-86 & entered on 7-23-86.
- cc to: Burke & Parsons, 1114 Ave of the Amer. NYC 10036, Kaplan Russin, Vecchi & Kirkwood, 28 W 44th St, Suite 200, NYC 10036.
- 7-24-86 — Forwarded copy of Notice of Appeal to Dist Judge & copy of Notice of Appeal & docket entries to Court of Appeals. (filed in 85 civ 4378RLC)

- 7-23-86 — Filed plttf United Carriers Notice of Appeal from the opinion dtd 5-5-86, judgt entered on 5-9-86 & the order denying plttfs motion dtd 6-25-86.
- cc to: Kaplan Russin Vecchi & Kirkwood, 28 W 44th St, NYC 10036.
- 7-24-86 — Forwarded copy of Notice of Appeal to Dist Judge & copy of Notice of Appeal & docket entries to Court of Appeals. (Orig filed in 85 civ 4378RLC #12)
- 8-1-86 18 Filed Notice that original record of appeal has been transmitted to the USCA 2nd cir.
- 11-30-87 19 Fld True Copy of Order, Mandate & Judgment #87,2218 with attached opinion from the USCA for the 2nd Circuit, Ordered that the judgment of said District Court reversed & the action is remanded to the said district court for further proceedings in accordance with the opinion of this court with costs to be taxed against the appellee with attached statement of costs taxed in the amount of \$2,945.82 in favor of Appellant, Amerada Hess Shipping Corp. . . . Clerk, Elasine B. Goldsmith. copy to chambers

DOCKET ENTRIES—DISTRICT COURT
(United Carriers)

Plaintiff
UNITED CARRIERS, INC.
Defendant
ARGENTINE REPUBLIC

DIST: 208
OFF: 1
DOCKET: Yr. 85 Number 4378
FILING DATE: Mo. 6 Day 7 Year 85
J 3
N/S 380
O 1
\$ DEMAND
Nearest \$1,000 10
JUDGE MAG NO. J 0898, 0857
COUNTY: 99999
DOCKET: Yr. 85 Number 4378

Cause

(CITE THE U.S. CIVIL STATUTE UNDER WHICH THE CASE IS
FILED AND WRITE A BRIEF STATEMENT OF CAUSE)

Pur. to 28 U.S.C. 1350 (Alien Tort Claims Act)
—Action for pers. prop. dmgs

Attorneys

By: FRANCES PETERS	KAPLAN, RUSSIN VECCHI
BURKE & PARSONS	& KIRKWOOD
1114 Avenue of the Americas	28 W 44th St Suite 200
New York, N.Y. 10036	N.Y.C. 10036
(212) 354-3800	869-4350

Date	Filing Fees Paid	Statistical Card
07 Jun 1985	Re. Number	Card-Date
	10-88801	Issued: 5-9-86

PROCEEDINGS

Date	NR.	Judge Carter
6-7-85	1	Fld. Complaint; Issd. Summons & Notice purs. to 28 U.S.C. 636(c).
6-14-85	2	Filed NOTICE OF ASSIGNMENT to Judge Carter. c/c
6-26-85	3	Filed Clerk's Certificate of Mailing of sum- mons and complaint upon: Lic. Dante Caputo Minister of Foreign Affairs Ministry of Foreign Affairs Reconquista 1088 Buenos Aires [Argentina 1003 reg. #206319996 ret. 7-4-85]
8-8-85	4	Filed Stip & Order that the time for the deft to respond to the summons & complt is ext. to 9-16-85 .. So Ordered .. Carter, J.
9-12-85	5	Filed defts Notice of Motion & Memo of Law for an order to dismiss action. RET: 9-27-85
10-17-85	6	Filed Stip that the time for plttfs to re- spond to defts motion papers is ext to 10- 21-85 .. hearing date for motion is adj. to 11-1-85 .. So Ordered .. Carter, J.
11-15-85	7	Filed plttfs Affdvt of Raymond J. Burke in opposition to deft's motion to dismiss.
11-15-85	8	Filed Joint Memo of Law in opposition to deft's motion to dismiss.
12-4-85	9	Filed Stip & Order that the time for deft's reply to plttfs' jt Memo of Law in oppo- sition to deft's motion to dismiss is ext to 12-6-85 .. So Ordered .. Carter, J.

- 12-6-85 10 Filed def't's response to pl'tffs' jt memorandum of law in opposition to def't's motion to dismiss.
- Filed Opinion #59270. . . (orig filed in 85 civ 4365RLC #11)
- 5-9-86 11 Filed Judgt that complt is dismissed. EOD 5-9-86 cm
- 5-20-86 — Filed pl'tffs affdvts & Notice of Motion for an order to amend court's findings. RET: 6-19-86 (orig filed in 85 civ 4365RLC) #13
- 5-20-86 — Filed pl'tffs Memo of Law in support of its motion to amend (orig filed in 85 civ 4365RLC #14).
- 5-22-86 — Filed pl'tffs Jt Memo of Law in support of its motion. (orig filed in 85 civ 4365RLC #15)
- 6-29-86 — Filed def't's reply to pl'tffs' jt motion under rule 52(b). (orig filed in 85 civ 4365RLC #16)
- 6-25-86 — Filed Memo Endorsed on #13 of 85 civ 4365RLC . . motion denied . . So Ordered . . Carter, J. cm
- 7-23-86 12 Filed pl'tffs Notice of Appeal to the USCA 2nd cir from the opinion dtd 5-5-86 & judgt dtd 5-9-86, & the order denying pl'tffs motion dtd 6-25-86.
- cc to: Kaplan, Russin, Vecchi & Kirkwood, 28 W 44th St, NYC 10036.
- 7-24-86 — Forwarded copy of Notice of Appeal to Dist Judge & copy of Notice of Appeal & docket entries to the Court of Appeals. (orig. filed in 85 civ 4365RLC)

- 7-23-86 — Filed pl'tff Amerada Hess Notice of Appeal to the USCA 2nd cir from the judgt dtd 5-9-86 & entered on 6-24-86.
- cc to: Burke & Parsons, 1114 Ave of the Amer. NYC 10036, Kaplan, Russin Vecchi & Kirkwood, 28 W 44th St, Suite 200, NYC 10036.
- 7-24-86 — Forwarded copy of Notice of Appeal to Dist. Judge & copy of Notice of Appeal & docket entries to Court of Appeals. (orig filed in 85 civ 4365RLC #17)
- 8-1-86 13 Filed Notice that original record of appeal has been transmitted to the USCA 2d cir.
- 12-18-87 14 Fld. True Copy of order from the USCA-Second Circuit that the motion for a recall of mandate and for a stay purs. to FRAP 41(b) is hereby granted. CLERK USCA. jl

**DOCKET ENTRIES—COURT OF APPEALS
(Amerada Hess Shipping)**

CASE NO.: 86-7603 JUDGE BELOW: CARTER (0857)
CALENDAR NUMBER: 334

Official Caption¹

Docket No. 86-7603
AMERADA HESS SHIPPING CORPORATION,
Plaintiff-Appellant,
v.
ARGENTINE REPUBLIC,
Defendant-Appellee.

Authorized Abbreviated Caption²

Docket No. 86-7603
AMERADA HESS SHIP CORP V. ARGENTINE REP

Appellant:

HILL, RIVKINS, CAREY
LOESBERG O'BRIEN
& MULROY
21 West Street
New York, N.Y. 10006
(212) 825-1000
Att: Douglas R. Burnett, Esq.

Appellee:

KAPLAN, RUSSIN, VECCHI
& KIRKWOOD
28 West 44th Street, Suite 200
New York, N.Y. 10036
(212) 869-4350
Att: Jeanne Ferris Siegel, Esq.

BURKE & PARSONS
1114 Avenue of the Americas
New York, N.Y. 10036
(212) 354-3800

For Official Caption and Complete Set of Attorney Listings
Please See The LEAD DOCKET CARD

Lead Docket Number 86-7602

¹ Fed. R. App. P. 12(a) and 32(a).

² For use on correspondence and motions only.

**GENERAL DOCKET
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

Date	FILINGS—PROCEEDINGS 86-7603
7-24-86	Copy of district court docket entries and notice of appeal on behalf of the appellant, AMERADA HESS SHIPPING CORPORATION, filed
7-24-86	Copy of receipt re: Payment of docketing fee in district court filed
8-1-86	Appellant AMERADA HESS SHIPPING CORPORATION Form C filed (w/pfs/copy of order)
8-1-86	Appellant AMERADA HESS SHIPPING CORPORATION Form D filed (w/pfs)
8-1-86	Record on Appeal filed (original papers of district court)
8-5-86	Appellant AMERADA HESS SHIPPING CORPORATION Notice of Motion for CONSOLIDATION of this appeal with docket number 86-7602, FILED. (original to FS).
8-6-86	SCHEDULING ORDER #1, FILED.

FOR FURTHER DOCKET ENTRIES PLEASE
SEE THE LEAD DOCKET CARD 86-7602

For Official Caption and Complete Set of Attorney
Listings Please See The LEAD DOCKET CARD

Lead Docket Number 86-7602

DOCKET ENTRIES—COURT OF APPEALS
(United Carriers)

CASE NO.: 86-7602 JUDGE BELOW: CARTER (0857)
 CALENDAR NUMBER: 333

Official Caption¹

Docket No. 86-7602 & 86-7603
 UNITED CARRIERS, INC., and
 AMERADA HESS SHIPPING CORPORATION,
Plaintiffs-Appellants,
 v.
 ARGENTINE REPUBLIC,
Defendant-Appellee.

Authorized Abbreviated Caption²

Docket No. 86-7602 & 86-7603
 UNITED CARRIERS V. ARGENTINE REP

¹ Fed. R. App. P. Rule 12(a) and 32(a).

² For use on correspondence and motions only.

Appellant:

BURKE & PARSONS
 BY: THOMAS J. HAWLEY
 1114 Avenue of the Americas
 New York, N.Y. 10036
 (212) 354-3800
 Attn: Stephen P. Kyne, Esq.

HILL RIVKINS CAREY
 LOESBERG O'BRIEN MULROY
 21 West Street
 NYC, NY 10004
 (212) 825-1000
 Attn: Douglas R. Burnett, Esq.

Appellee:

BRUNO A. RISTAU, ESQ.
 KAPLAN, RUSSIN, VECCHI
 1215-17th Street, N.W.
 Washington, D.C. 20036
 (202) 887-0353

AMICUS CURIAE:
 REPUBLIC OF LIBERIA
 FRANK L. WISWALL, JR.
 11870-D Sunrise Valley Dr.
 Reston, Virginia 22091-3303
 703-620-6780

AMICUS CURIAE:
 JAMES T. LAFFERTY
 SEAMEN'S CHURCH INST. OF
 N.Y. and N.J.
 50 Broadway, Third Floor
 New York, N.Y. 10004
 (212) 269-2710

AMICUS CURIAE:
 DAVID EPSTEIN or
 MICHAEL J. SINGER, ESQS.
 Civil Division
 Department of Justice
 550 11th Street, N.W.
 Room 1234
 Washington, D.C. 20530
 (202) 724-7455

**GENERAL DOCKET
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

Date	FILINGS—PROCEEDINGS 86-7602
7-25-86	Copy of district court docket entries and notice of appeal on behalf of Appellant UNITED CARRIERS, INC., Filed.
7-25-86	Copy of receipt re: payment of docketing fee in district court, filed. (received on 7-24-86)
8-1-86	Appellant UNITED CARRIERS, INC., Form C, Filed. (w/pfs)
8-1-86	Appellant UNITED CARRIERS, INC., Form D, Filed. (w/pfs)
8-1-86	Record on Appeal Filed.
8-4-86	SCHEDULING ORDER #1, FILED.
8-13-86	Order granted Appellant AMERANDA [sic] HESS SHIPPING motion for consolidation of appeals filed (as to Docket #'s 86-7602 and 86-7603) SCHEDULING ORDER #2 filed (both orders endorsed on motion filed 8-5-86)
8-29-86	Movant REPUBLIC OF LIBERIA motion for leave to file a brief as amicus curiae filed (w/pfs)
9-8-86	Order granting movant REPUBLIC OF LIBERIA leave to file a brief as amicus curiae filed
9-10-86	Amicus Curiae REPUBLIC OF LIBERIA brief filed (w/pfs)
9-12-86	Movant SEAMEN'S CHURCH INSTITUTE motion for leave to file brief as Amicus Curiae filed (w/pfs)
9-12-86	Movant SEAMEN'S CHURCH INSTITUTE Amicus Curiae brief <i>received</i> (w/ps)

9-12-86	Appellants UNITED CARRIERS, INC & AMER-ADA HESS CORPORATION page proof brief filed (w/pfs)
9-12-86	Appellants UNITED CARRIERS, INC & AMER-ADA HESS CORPORATION joint appendix filed (w/pfs)
9-15-86	Appellants UNITED CARRIERS INC & AMER-ANDA [sic] HESS CORPORATION final form brief filed (w/pfs)
9-17-86	Order granting movant SEAMEN'S CHURCH INSTITUTE Leave to file brief as an Amicus Curaie [sic], filed (endorsed on motion filed 9/12/86)
9-17-86	AMICUS SEAMEN'S CHURCH INSTITUTE Amicus Curiae Briefs, filed (w/pfs).
10-2-86	Appellee ARGENTINE REPUBLIC, Brief filed (w/pfs).
11-3-86	Case heard before Feinberg, Chief Judge, Oakes, Kearse, C.JJ.
11-20-86	Transcript of oral argument filed
1-21-87	Amicus Curiae UNITED STATES AMERICA brief filed w/pfs.
1-28-87	Appellant AMERADA HESS SHIPPING CORP motion for permission to respond to amicus brief of United States filed (w/pfs) (see order of 1-30)
1-30-87	ORDER MOOTING appellant AMERADA HESS SHIPPING CORP motion for permission to respond to amicus brief of United States FILED (before: WF; JLO; ALK; endorsed on motion of 01-28-87).
2-4-87	Amicus Curiae SEAMEN'S CHURCH INST. OF NY & NJ letter in response to brief of Amicus Curiae USA filed

- 2-5-87 Appellee ARGENTINE REPUBLIC letter in response to Amicus Curiae USA brief filed
- 2-9-87 Appellants UNITED CARRIERS INC and AMERADA HESS SHIPPING CORPORATION joint reply brief to Amicus Curiae Brief of USA filed (w/pfs)
- 7-16-87 Amicus Curiae SEAMEN'S CHURCH INSTITUTE letter response to the Court's letter of July 2, 1987 requesting further briefing from the parties in the appeal *received*
- 7-23-87 Amicus Curiae the REPUBLIC OF LIBERIA response to the Court's letter of July 2, 1987 requesting further briefing from the parties in the appeal *received* w/pfs.
- 7-23-87 Appellee ARGENTINE REPUBLIC letter response to the Court's letter of July 2, 1987 requesting further briefing from the parties in the appeal *received*
- 7-23-87 Appellants AMERADA HESS SHIPPING CORP. and UNITED CARRIERS, INC. joint response to the Court's letter of July 2, 1987 requesting further briefing from the parties in the appeal *received*
- 7-23-87 Amicus Curiae U.S. DEPT. OF JUSTICE letter response to the Court's letter of July 2, 1987 requesting further briefing from the parties in the appeal *received*
- 7-24-87 Appellee ARGENTINE REPUBLIC letter response to the Court's letter of July 2, 1987 requesting further briefing from the parties in the appeal *received*
- 9-11-87 Judgment reversed and remanded by a published signed opinion filed. (WF, CH.J.).
- 9-11-87 Judge Kearse dissents in a separate opinion.

- 9-11-87 Judgment filed.
- 9-22-87 Appellants UNITED CARRIERS INC., et al itemized and verified bill of costs *received*. (w/pfs).
- 9-24-87 Appellants AMERADA HESS SHIPPING CORP., itemized and verified bill of costs *received*. (w/pfs).
- 9-25-87 Appellee ARGENTINE REPUBLIC petition for rehearing with a suggestion for a rehearing en banc filed. (w/pfs).
- 9-30-87 Amicus Curiae USA motion for leave to file out of time petition for rehearing *received* (w/pfs)
- 9-30-87 Amicus Curiae USA petition for rehearing with suggestion for rehearing in banc *received* (w/pfs)
- 10-5-87 Amicus Curiae USA motion for leave to file out of time petition for rehearing with in banc suggestion filed (w/pfs)
- 10-19-87 Order granted amicus Curiae USA motion for leave to file out of time petition filed (endorsed on motion filed 10-5-87) [Clerk]
- 10-19-87 Amicus Curiae USA petition for rehearing with suggestion for rehearing in banc filed (w/pfs)
- 11-18-87 Order denied appellee ARGENTINE REPUBLIC petition for rehearing with suggestion for rehearing in banc filed (Clerk)
- 11-18-87 Order denied amicus Curiae USA petition for rehearing with suggestion for rehearing in banc filed (Clerk)
- 11-25-87 Appellants AMERADA HESS SHIPPING CORP statement of costs filed (2945.82)
- 11-25-87 Appellee ARGENTINE REPUBLIC statement of cost filed (\$2946.35).
- 11-25-87 Mandate issued. (opinion, judgment, & statement of cost)

- 12-3-87 Appellee ARGENTINE REPUBLIC motion for recall of mandate filed w/pfs
- 12-10-87 Appellants, AMERADA HESS SHIPPING CORP and UNITED CARRIERS, INC. affidavit in opposition to the motion of the ARGENTINE REPUBLIC motion to recall the mandate filed w/pfs.
- 12-11-87 Appellee ARGENTINE REPUBLIC letter in response affidavit in opposition to the motion of the ARGENTINE REPUBLIC motion to recall the mandate *received*
- 12-14-87 Order granting appellee ARGENTINE REPUBLIC motion for recall of mandate and for stay pursuant to FRAP 41(b) filed. (WF, JLO, ALK) (endorsed on motion filed 12-3-87)
- 1-13-88 Appellee ARGENTINE REPUBLIC motion for further stay of mandate filed w/pfs.
- 1-15-88 Order granting appellee ARGENTINE REPUBLIC motion for further stay of mandate filed (WF, Ch.J., JLO, ALK, C.JJ) (endorsed on motion filed 1-13-88)
- 2-26-88 Notice of filing petition for writ of certiorari dated 2/16/88 FILED (S.C. #87-1372)
- 4-22-88 Certified copy of order Supreme Court GRANTING PETITION FOR WRIT OF CERTIORARI filed

COMPLAINT (AMERADA HESS SHIPPING)

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
Index No. 85 Civ 4565 (RLC)**

AMERADA HESS SHIPPING CORPORATION,
Plaintiff,
- against -
ARGENTINE REPUBLIC,
Defendant.

VERIFIED COMPLAINT

The plaintiff, AMERADA HESS SHIPPING CORPORATION, by its attorneys, HILL RIVKINS CAREY LOESBERG O'BRIEN & MULROY, complaining of the above named defendant, alleges upon information and belief:

Parties:

FIRST: Plaintiff, AMERADA HESS SHIPPING CORPORATION is a corporation organized under the law of the Republic of Liberia with a place of business in Monrovia, Liberia.

SECOND: The Argentine Republic is a member of the United Nations.

Jurisdiction

THIRD: This Court has jurisdiction over this action pursuant to the Alien Tort Claims Act, 28 USC §1350.

FOURTH: This is a case of admiralty and maritime jurisdiction, as hereinafter more fully appears. This is an

admiralty and maritime claim within the meaning of Rule 9(h) of the Federal Rules of Civil Procedure.

FIFTH: This Court has jurisdiction over this action according to the principle of universal jurisdiction, recognized in customary international law, over those violations of international law which offend against the community of nations and which are hereinafter more fully set forth.

Cause of Action

SIXTH: S/T HERCULES was a steam-turbine crude oil tanker of 220,117 deadweight tons, built in 1971, Lloyd's Register No. 7038434, American Bureau of Shipping No. 7100481, and registered under the laws of the Republic of Liberia.

SEVENTH: On April 26, 1977, in a Charter Party signed in New York, AMERADA HESS SHIPPING CORPORATION chartered the S/T HERCULES from her Owners, United Carriers, Inc., for a period of five years, subsequently extended.

EIGHTH: From the opening of the Trans-Alaska Pipeline System, S/T HERCULES was continuously employed in the domestic trade of the United States, carrying full cargos of Alaska North Slope crude oil from Valdez, Alaska, via Cape Horn to the Hess Oil Virgin Islands Company Refinery at St. Croix, United States Virgin Islands. At the time of her loss she was so engaged. Pursuant to the Charter Party, the plaintiff was obligated to pay for the bunkers which were at all times the property of AMERADA HESS SHIPPING CORPORATION. It was the customary practice of AMERADA HESS SHIPPING CORPORATION to bunker the S/T HERCULES for a round trip voyage from the Amerada Hess Refinery.

NINTH: The S/T HERCULES, with a beam of 158.13 feet, was unable to use the Panama Canal which is restricted to ships with beams under 107 feet.

TENTH: The S/T HERCULES was a participant in the AMVER System (Automated/Merchant Vessel Reporting System), an international vessel position reporting system, operated by the United States Coast Guard, which coordinates assistance to ships in distress, regardless of nationality. Military use of information voluntarily transmitted by merchant ships is strictly forbidden by international custom and practice.

ELEVENTH: The local AMVER reporting station for ships transitting the South Atlantic is "General Pacheco", a radio station operated by the Government of Argentina. The S/T HERCULES routinely transmitted to General Pacheco, when the ship was sailing in the South Atlantic, giving the ship's name, international call sign, registry, position, course, speed, and voyage description.

TWELFTH: Liberian flag ships, such as the S/T HERCULES, are considered national defense assets of the United States of America, available for national service in time of war and by this reason, deserve full protection under the laws of this country.

THIRTEENTH: On or about April 2, 1982 the armed forces of the Republic of Argentina undertook an invasion of the Falkland Islands, also known as the Islas Malvinas, a British Crown Colony, and hostilities then commenced between the Republic of Argentina and the United Kingdom.

FOURTEENTH: At all times during the above-mentioned Falkland/Malvinas conflict, the Republic of Liberia maintained the status of a neutral country.

FIFTEENTH: On May 2, 1982, H.M.S. CONQUEROR, a Royal Navy submarine, torpedoed and sank the GENERAL BELGRANO, an Argentine Navy cruiser.

SIXTEENTH: At 1330 GMT on May 5, 1982, pursuant to instructions from the Argentine Navy ship EAHIA PARAISO, and as required by international law, the S/T

HERCULES, on a laden voyage from Valdez to St. Croix, altered her course to search for survivors of the GENERAL BELGRANO. Following her release from these duties, the ship continued on her voyage to St. Croix. The Argentine Government was aware of the participation of the S/T HERCULES in the search for survivors. At no time during the Falklands War, did the S/T HERCULES aid or support British forces in the Atlantic Ocean.

SEVENTEENTH: On or about May 25, 1982, S/T HERCULES, in the course of her routine employment, commenced a return voyage in ballast from St. Croix, intending her usual passage via the South Atlantic and around Cape Horn, to Valdez.

EIGHTEENTH: On June 2, 1982, Argentine military aircraft attacked the 15,649 deadweight ton British flag tanker, WYE, in the South Atlantic.

NINETEENTH: At 1330 GMT on June 3, 1982, the U.S. Maritime Administration issued a telex to Argentina and the United Kingdom, advising both belligerents of neutral U.S. flag merchant ships and Liberian flag tankers operating in the South Atlantic. The telex stated, in part:

"3. The following Liberian-flag tankers are carrying Alaskan Oil to the U.S. Virgin Islands via Cape Horn:

HERCULES/6ZAB Enroute St. Croix, VI
 to Valdez, A1
 ETA Exclusion Zone
 8-11 June."

TWENTIETH: The S/T HERCULES, stopped briefly at Rio de Janeiro, Brazil, on June 4, 1982 for vessel support services, and resumed her voyage to Alaska. At all times she flew the Liberian flag and was painted and outfitted as a commercial tanker. Across her stern, in accordance with international law, the ship's name "HERCULES" and her home port, "Monrovia", were painted in bold faced white letters.

TWENTY-FIRST: At 1215 GMT on June 8, 1982, the Master of the HERCULES made his routine AMVER report to radio station "General Pacheco", giving the ship's name, international call sign, registry, position, course, speed, and voyage description, "Rio de Janeiro to Valdez, Alaska via Cape Horn."

TWENTY-SECOND: At 1300 GMT, on June 8, 1982, a four engine Argentine military aircraft began circling the HERCULES, which was at all times steaming on a steady course at a steady speed.

TWENTY-THIRD: At 1344, GMT, on June 8, 1982, the S/T HERCULES transmitted a second AMVER report, essentially repeating the text of the earlier 1215 GMT message.

TWENTY-FOURTH: At 1350 GMT, at 46 degrees ten minutes S., 49 degrees 30 minutes W., the S/T HERCULES was attacked by Argentine military aircraft in a low level bombing strike.

TWENTY-FIFTH: At 1430 GMT, at 45 degrees 16 minutes S., 49 degrees 25 minutes W., the S/T HERCULES was subjected to a second bombing attack by Argentine military aircraft.

TWENTY-SIXTH: At 1625 GMT, at 46 degrees 8 minutes S., 48 degrees 55 minutes W., the S/T HERCULES was subjected to a third attack by Argentine aircraft which struck the ship with air-to-surface rockets.

TWENTY-SEVENTH: Following the third attack, the S/T HERCULES changed course and steered for the nearest safe port of refuge, Rio de Janeiro, Brazil.

TWENTY-EIGHTH: At 1720 GMT and 1800 GMT, well after the end of the third attack, an Argentine shore station, call sign LOV 3, located at the Argentine Naval Base at Ushusia, Argentina, addressed a message in English to call sign 6ZAB, the S/T HERCULES, on the international distress frequency of 2182 KZ, the text of which stated:

"Steer 270 to make Argentine port. If you cannot make Argentine port you will be attacked in 15 minutes time."

TWENTY-NINTH: The Master of the S/T HERCULES was able to establish radio contact with the Argentine radio station confirming that the S/T HERCULES was a neutral ship in peaceful transit on the high seas and that his ship had already been attacked.

THIRTIETH: As a result of the bombing and rocket attacks by Argentine military aircraft the S/T HERCULES suffered extensive hull and deck damage. Additionally, a bomb penetrated the ship's starboard side, lodging in the bottom of the ship's No. 2 tank, where it remained, undetonated.

THIRTY-FIRST: On June 12, 1982, the S/T HERCULES arrived at the port of refuge, Rio de Janeiro, Brazil.

THIRTY-SECOND: Upon arrival, Brazilian naval officers under the authority of the Captain-of-the-Port, boarded the ship and conducted a complete investigation of the circumstances surrounding the bombing of the HERCULES. The ship's logs were verified and statements were obtained from all of the ship's officers. The Brazilian Navy inquiry found nothing connected with the ship which would violate its neutral status under international law or justify the attack on that vessel.

THIRTY-THIRD: By reason of the attacks and the lodging of an undetonated bomb in No. 2 port wing tank, it was determined by the shipowner, United Carriers, Inc., due to the hazards which would accompany an attempt to remove the undetonated bomb, that it was compelled to order the scuttling of the S/T HERCULES.

THIRTY-FOURTH: On or about July 20, 1982, S/T HERCULES was scuttled, along with her bunkers, at a point approximately 250 miles from the Brazilian Coast.

THIRTY-FIFTH: Under international law, belligerents engaged in war are prohibited from attacking neutral merchant ships on the high seas.

THIRTY-SIXTH: S/T HERCULES at all times during the Falklands/Malvinas conflict maintained her status as a neutral vessel, did not aid or support British forces in the South Atlantic, and flew the Liberian flag.

THIRTY-SEVENTH: At the time of the attack, the S/T HERCULES was 572 nautical miles from the nearest point of the Argentine mainland and 475 nautical miles from the nearest point of contact with the Falkland Islands.

THIRTY-EIGHTH: The unprovoked attacks on S/T HERCULES were thus a violation of the law of nations and of the laws of the United States, in that they were committed against the unarmed merchant vessel of a neutral country in innocent passage upon the high seas.

THIRTY-NINTH: The appearance and attack by Argentine military aircraft so soon after the AMVER report transmitted by the S/T HERCULES gives rise to the inference that Argentina made improper use of the AMVER System for military purposes, in violation of international law and practice.

FORTIETH: As a direct result of the unprovoked attack on the S/T HERCULES, AMERADA HESS SHIPPING CORPORATION lost the bunkers which the ship had on board consisting of 11,438 long tons of fuel oil and 12 long tons of diesel oil valued at \$1,901,259.07.

FORTY-FIRST: Since the loss of the S/T HERCULES, plaintiff's attorneys have tried unsuccessfully to obtain competent Argentine counsel who would pursue a claim directly against Argentina in the Courts of that country. Argentine attorneys have declined to handle the matter because of the politically charged nature of the claim and

knowledge that the claim is opposed by the Argentine Government.

WHEREFORE, plaintiff prays:

(1) That a decree be entered in favor of plaintiff, AMERADA HESS SHIPPING CORPORATION, in the amount of \$1,901,257.07, together with interest, costs, and attorneys' fees;

(2) For such other, further, and different relief as to this Court may deem just and proper in the premises.

Dated: New York, New York

June 7, 1985.

By: /s/ DOUG BURNETT

A Member of the Firm
(Attorneys for Plaintiff)
(AMERADA HESS SHIPPING CORPORATION)

HILL RIVKINS CAREY LOESBERG O'BRIEN
& MULROY
21 West Street
New York, New York 10006
(212) 825-1000

cc: Minister of Foreign Affairs
Ministry of Foreign Affairs
3 East Arenales 761
Buenos Aires 1061
Argentina

VERIFICATION

STATE OF NEW YORK :
: SS:
COUNTY OF NEW YORK :

DOUGLAS R. BURNETT, of full age, being duly sworn according to law, upon his oath deposes and says that he is an associate in the firm of HILL RIVKINS CAREY LOESBERG O'BRIEN & MULROY, Esqs., attorneys for plaintiff herein; that he has read the foregoing Verified Complaint and that the allegations contained therein are true to the best of his information, knowledge and belief; and that the source of deponent's knowledge are the reports and information received from the plaintiff, its agents, attorneys, and other third parties.

/s/ DOUG BURNETT
DOUGLAS R. BURNETT

Sworn and subscribed to
before me this 7th day
of June, 1985.

/s/ THOMAS D. TOY
Notary Public

THOMAS D. TOY
Notary Public, State of New York
No. 30-4003400
Qualified in Nassau County
Commission Expires March 30, 1967

COMPLAINT (UNITED CARRIERS)**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

UNITED CARRIERS, INC.,

Plaintiff,

- against -

ARGENTINE REPUBLIC,

*Defendant.***COMPLAINT**

Plaintiff UNITED CARRIERS, INC., by its attorneys Burke & Parsons, complaining of Defendant ARGENTINE REPUBLIC, alleges upon information and belief as follows:

FIRST: This action arises under the Alien Tort Claims Act, 28 U.S.C. §1350 (1982), as hereinafter more fully appears.

SECOND: At all times hereinafter mentioned, Plaintiff United Carriers, Inc. was and still is a corporation duly organized and existing under the laws of the Republic of Liberia, and was the owner of the tank vessel S/T Hercules (the "Vessel").

THIRD: The Vessel was built in 1971, had an overall length of 1,058 feet, a beam of 158 feet, and deadweight tonnage of 220,117 tons. She was registered under the laws and flew the flag of the Republic of Liberia.

FOURTH: At all relevant times, the Republic of Liberia was a neutral country and the Vessel was a neutral, unarmed merchant vessel.

FIFTH: From the opening of the Trans-Alaska Pipeline ("Pipeline") in 1977 until July 1982, the Vessel was con-

tinuously employed in the domestic trade of the United States, carrying full cargoes of Alaskan North Slope crude oil from the southern terminus of the Pipeline at Valdez, Alaska around the southern tip of South America to the Hess Oil Virgin Islands Company refinery at St. Croix, United States Virgin Islands.

SIXTH: On or about April 2, 1982, the armed forces of the Argentine Republic undertook an invasion of the Falkland Islands/Islands Malvinas resulting in hostilities between the Argentine Republic and Great Britain.

SEVENTH: Having discharged her cargo of Alaskan North Slope crude oil at St. Croix, on or about May 25, 1982 the Vessel commenced a return voyage in ballast from St. Croix to Valdez.

EIGHTH: On or about June 8, 1982, at a point approximately 572 nautical miles from the nearest point of the Argentine mainland, and approximately 475 nautical miles from the nearest point of contact with the Falkland Islands/Islands Malvinas, the Vessel was subjected to three separate bombing attacks, without warning, by aircraft of the Argentine armed forces.

NINTH: The locations of the attacks were outside of the zones of exclusion designated by both the Argentine Republic and Great Britain.

TENTH: The unprovoked attacks on the Vessel were in violation of the law of nations and of the laws of the United States, in that they were committed against an unarmed merchant vessel of a neutral country in innocent passage upon the high seas.

ELEVENTH: By reason of the attacks, the Vessel suffered damage and diverted to Rio de Janeiro, Brazil as a port of refuge, where she arrived on or about June 12, 1982.

TWELFTH: On or about June 13, 1982, an undetonated bomb was found in one of the Vessel's tanks, which caused

the Government of Brazil to order the Vessel to leave port immediately.

THIRTEENTH: Following further inspections of the Vessel conducted while she was anchored offshore, the decision was made to scuttle the Vessel to avoid the risks inherent in an attempt to remove the bomb.

FOURTEENTH: On or about July 20, 1982, the Vessel was towed to a point approximately 250 nautical miles from the Brazilian coast and scuttled with the permission of the Government of Brazil.

FIFTEENTH: By reason of the premises, Plaintiff UNITED CARRIERS, INC. has sustained damages in the amount of \$10,000,000 plus interest.

WHEREFORE, Plaintiff UNITED CARRIERS, INC. respectfully prays that the Court order, adjudge and decree that Plaintiff have a judgment against Defendant ARGENTINE REPUBLIC for the claim asserted herein, together with the interest and costs, and Plaintiff further prays for such other, further, and different relief as to this Court may seem just and proper in the premises.

Dated: New York NY
June 7, 1985

BURKE & PARSONS
Attorneys for Plaintiff
UNITED CARRIERS, INC.
1114 Avenue of the Americas
New York NY 10036
(212) 354-3800
Ref: 6955

By /s/ Raymond J. Burke Jr.
A Member of the Firm

**NOTICE OF MOTION BY DEFENDANT TO DISMISS
AGAINST AMERADA HESS**

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
85 Civ. 4365 (RLC)**

AMERADA HESS SHIPPING CORPORATION,
Plaintiff,

v.

ARGENTINE REPUBLIC,
Defendant.

NOTICE OF MOTION BY DEFENDANT TO DISMISS

MOTION BY:	KAPLAN RUSSIN VECCHI & KIRKWOOD Attorneys for the Defendant Argentine Republic
DATE, TIME AND PLACE OF HEARING:	September 27, 1985, at 10:00 a.m., Courtroom 518, United States Courthouse, Foley Square, New York, New York 10017
RELIEF SOUGHT:	An order, pursuant to Rule 12(b), F.R.Civ.P., dismissing the action (1) for lack of juris- diction over the subject matter and (2) for lack of jurisdiction over the person
SUPPORTING PAPERS:	Memorandum of Law in Sup- port of Defendant's Motion to Dismiss

ANSWERING PAPERS:

Pursuant to Rule 6,
F.R.Civ.P., and Rule 3 of the
Civil Rules of this Court, an-
swering papers, if any, shall
be served at least three days
before the return date.

DATED: September 11, 1985

KAPLAN RUSSIN & VECCHI
1218 16th Street, N.W.
Washington, D.C. 20036
(202) 638-0060

By: /s/ BRUNO A. RISTAU
BRUNO A. RISTAU

KAPLAN RUSSIN VECCHI
& KIRKWOOD
28 West 44th Street
Suite 200
New York, New York 10036

By: /s/ JEANNE FERRIS SIEGEL
JEANNE FERRIS SIEGEL

Attorneys for the
Defendant Argentine
Republic

TO: HILL RIVKINS CAREY LOESBERG
O'BRIEN & MULROY
21 West Street - 21st Floor
New York, New York 10006

Attorneys for the Plaintiff
Amerade Mess Shipping Corporation

**NOTICE OF MOTION BY DEFENDANT TO DISMISS
AGAINST UNITED CARRIERS**

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
85 Civ. 4378 (RLC)**

UNITED CARRIERS, INC. CORPORATION,
Plaintiff,

v.

ARGENTINE REPUBLIC,
Defendant.

NOTICE OF MOTION BY DEFENDANT TO DISMISS

MOTION BY:

KAPLAN RUSSIN VECCHI
& KIRKWOOD
Attorneys for the
Defendant Argentine
Republic

**DATE, TIME AND PLACE
OF HEARING:**

September 27, 1985, at 10:00
a.m., Courtroom 518, United
States Courthouse, Foley
Square, New York, New York
10017

RELIEF SOUGHT:

An order, pursuant to Rule
12(b), F.R.Civ.P., dismissing
the action (1) for lack of juris-
diction over the subject matter
and (2) for lack of jurisdiction
over the person

SUPPORTING PAPERS:

Memorandum of Law in Sup-
port of Defendant's Motion to
Dismiss

ANSWERING PAPERS:

Pursuant to Rule 6,
F.R.Civ.P., and Rule 3 of the
Civil Rules of this Court, an-
swering papers, if any, shall
be served at least three days
before the return date.

DATED: September 11, 1985

KAPLAN RUSSIN & VECCHI
1218 16th Street, N.W.
Washington, D.C. 20036
(202) 638-0060

By: /s/ BRUNO A. RISTAU
BRUNO A. RISTAU

KAPLAN RUSSIN VECCHI
& KIRKWOOD
28 West 44th Street
Suite 200
New York, New York 10036

By: /s/ JEANNE FERRIS SIEGEL
JEANNE FERRIS SIEGEL

Attorneys for the
Defendant Argentine
Republic

TO: BURKE & PARSONS
1114 Avenue of the Americas
New York, New York 10036
Attorneys for the Plaintiff
United Carriers, Inc.

**AFFIDAVIT OF DOUGLAS R. BURNETT IN OPPOSITION
(AMERADA HESS)**

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
Index No. 85 Civ. 4365 (RLC)**

AMERADA HESS SHIPPING CORPORATION,
Plaintiff,
- against -
ARGENTINE REPUBLIC,
Defendant.

**AFFIDAVIT IN OPPOSITION TO DEFENDANT'S
MOTION TO DISMISS**

State of New York)
) ss.
City of New York)

DOUGLAS R. BURNETT, being duly sworn deposes
and says:

1. I am an associate with the firm of HILL RIVKINS
CAREY LOESBERG O'BRIEN & MULROY, which res-
presents AMERADA HESS SHIPPING CORPORATION
("Amerada Hess") in this litigation.

2. On September 11, 1984 attorneys for the defendant,
ARGENTINE REPUBLIC filed a motion to dismiss this
lawsuit. On the same date, a similar motion was made to
dismiss the action brought by plaintiff, UNITED CAR-
RIERS, INC., against the ARGENTINE REPUBLIC, 85
Civ. 4378 (RLC).

3. For purposes of this motion, the positions of the
plaintiffs, AMERADA HESS SHIPPING CORPORATION

and UNITED CARRIERS, INC., in their respective actions as against the ARGENTINE REPUBLIC are identical. For this reason, and with the oral permission of the Court, a joint brief and joint set of plaintiffs' exhibits has been filed concurrent with this Affidavit.

4. The factual allegations contained in the Statement of Facts in the joint brief are fully supported by the Plaintiffs' Joint Exhibits, numbers 1 through 41. The legal arguments, based on these facts, are fully set forth in the Plaintiffs' Joint Brief. Because of the extensive nature of the exhibits and the legal arguments filed in opposition to the defendant's Motion to Dismiss, the facts and arguments are hereby incorporated in this Affidavit by reference.

5. For all of the above reasons, the plaintiff, AMERADA HESS SHIPPING CORPORATION, respectfully prays that this Court deny the motion by the defendant, ARGENTINE REPUBLIC, to dismiss this lawsuit.

/s/ DOUG BURNETT
DOUGLAS R. BURNETT

Sworn to me this 14th
day of November, 1985.

/s/ THOMAS E. WILLOUGHBY, JR.
Notary Public

THOMAS E. WILLOUGHBY, JR.
Notary Public State of New York
No. 60-4663321. Qual. in Westchester Co.
Certificate Filed in New York County
Commission Expires March 30, 1987

**AFFIDAVIT OF RAYMOND J. BURKE, JR. IN
OPPOSITION (UNITED CARRIERS)**

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
Index No. 85 Civ. 4378 (RLC)**

UNITED CARRIERS, INC., *Plaintiff,*
- against -
ARGENTINE REPUBLIC, *Defendant.*

**AFFIDAVIT IN OPPOSITION TO DEFENDANT'S
MOTION TO DISMISS**

State of New York)
) ss:
City of New York)

RAYMOND J. BURKE, JR., having been duly sworn,
deposes and says:

1. I am a member of the firm of BURKE & PARSONS, attorneys for plaintiff, UNITED CARRIERS, INC. ("United"), and am admitted to practice before this Honorable Court.

2. On September 11, 1984 attorneys for the defendant, ARGENTINE REPUBLIC filed a motion to dismiss this lawsuit. On the same date, a similar motion was made to dismiss the action brought by plaintiff, AMERADA HESS SHIPPING CORPORATION, against the ARGENTINE REPUBLIC, 85 Civ. 4365 (RLC).

3. For purposes of this motion, the positions of the plaintiffs, UNITED CARRIERS, INC. and AMERADA

HESS SHIPPING CORPORATION, in their respective actions as against the ARGENTINE REPUBLIC are identical. For this reason, and with the oral permission of the Court, a joint brief and joint set of plaintiffs' exhibits has been filed concurrent with this Affidavit.

4. The factual allegations contained in the Statement of Facts in the joint brief are fully supported by the Plaintiffs' Joint Exhibits, numbers 1 through 41. The legal arguments, based on these facts, are fully set forth in the Plaintiffs' Joint Brief. Because of the extensive nature of the exhibits and the legal arguments filed in opposition to the defendant's Motion to Dismiss, the facts and arguments are hereby incorporated in this Affidavit by reference.

5. For all of the above reasons, the plaintiff, UNITED CARRIERS, INC., respectfully prays that this Court deny the motion by the defendant, ARGENTINE REPUBLIC, to dismiss this lawsuit.

/s/ RAYMOND J. BURKE JR.,
RAYMOND J. BURKE, JR.

Sworn to me this 14th
day of November, 1985.

/s/ Christopher H. Dillon
Notary Public

CHRISTOPHER H. DILLON
NOTARY PUBLIC, State of New York
No. 31-4819700
Qualified in New York County
Commission Expires March 30, 1986

**EXHIBIT 1(A)—CHARTER PARTY BETWEEN UNITED
CARRIERS, INC. AND AMERADA HESS SHIPPING
CORPORATION DATED APRIL 26, 1977**

Esso International Inc.
Supply & Transportation
New York, N.Y.

Code word for this
Charter Party
ESSO TIME 1969

TANKER TIME CHARTER PARTY

New York, N.Y. April 26 1977

DESCRIPTION OF VESSEL

IT IS THIS DAY MUTUALLY AGREED BETWEEN UNITED CARRIERS, INC. Owner (hereinafter called "Owner") of the Liberian Steam/Tank Vessel built or to be built by Hitachi Shipyard, Sakai, Japan, called the HERCULES, of "Oil Carrier" 82,120 tons net register, classed ABS + AIE + AMS and to be so maintained during the currency of this Charter, fitted with engines of _____ Nominal, _____ Brake, 30,000 Shaft, or indicated H.P. as certified by Classification Society, and equipped with wireless telegraph to comply with existing International Regulations and to allow the Vessel to communicate with land stations, VHF Radio Telephone, [Deleted Material] and Butterworth Tank Cleaning machinery, [Deleted Material] and AMERADA HESS SHIPPING CORPORATION CHARTERER, as follows:

DEADWEIGHT

1. The Owner hereby declares that the Vessel can carry 216,641 tons (of 2,240 lbs.) total deadweight (as certified by Classification Society) of cargo, bunkers, water and stores on assigned summer mean draft of 63 ft. 7-5/8 in. in salt water, corresponding to a load line summer freeboard of 18 ft. 6-3/4 in. under present International Load Line Regulations, and that her loadline is marked and that the Vessel has a total capacity for bulk cargo, after deduction of 2% for expansion, of 8,925,179 cubic feet in cargo tanks, exclusive of permanent bunkers, which have a capacity, after deduction of 2% for expansion, of 9914.38 tons (of 40 cubic feet) oil fuel. In addition it is Charterer's understanding this Vessel's characteristics are approximately the

following: Suez Canal Net Registered Tons 97,787.46, Beam 48.2 meters LOA 322.3 meters. The deadweight, bulk cargo cubic capacity and SCNRT as stipulated in this charter are representations by the Owner. In the event, upon admeasurement it is determined that actual performance shows any failure to satisfy one or more such representations the hire shall be equitably decreased so as to indemnify the Charterer to the extent of such failure, this charter otherwise to remain unaffected. [Deleted Material]

DETAILS

2. [Deleted Material]

PERIOD—DELIVERY

3. The Owner hereby lets, and the Charterer hereby hires, the Vessel as herein described for the term of min 118 months max 122 months at Charterers' option [Deleted Material] hire to commence upon arrival safe port Persian Gulf, at Charterers' option, [Deleted Material] the Vessel being then ready with holds and cargo tanks, pipes and pumps [Deleted Material] in every way fitted for the service and the carriage of Crude Oil and/or Dirty Petroleum Products, and being on delivery tight, staunch and strong, after having been dry docked and painted at Owner's expense, and with pipe lines, pumps [Deleted Material] in good working condition, so far as the same can be attained by the exercise of due diligence, and with full complement of Master, Officers and Crew for a vessel of her size and character, and due diligence to be exercised to maintain her in such state during the currency of this Charter;

TRADE

[Deleted Material] Charterer shall be entitled to send the Vessel around Cape Horn at any time of the year. Charterer shall be allowed to breach Institute Warranties upon payment by Charterer of any additional insurance premium required by Vessel's Underwriters for such breach. See Clause 3(A)

COMMENCEMENT OF HIRE

4. Hire shall commence May 25/25 July 1977 [Deleted Material]

HIRE

5. The Charterer shall pay for the use of the Vessel hire at the rate of \$2.25 in United States currency per ton (of 2240 lbs) on Vessel's deadweight as per Clause One (1) per calendar month, payment to be made in advance monthly at New York, N.Y. by check without discount less any disbursements or advances made to the Master or Owner's Agents. Charterer shall also be entitled to deduct from hire payments any previous overpayments of hire and amounts due Charterer under clause 9 hereof. Hire shall commence from time of delivery of the Vessel as aforesaid and shall continue until the hour of her redelivery to the Owner (unless lost) at a safe Persian Gulf port at Charterers' option excluding Fao or Abadan.

INCREMENT

6. It is mutually understood and agreed that the [Deleted Material] following expenses and payments will apply to this Charter Party:

- a) Expenses and cost of extra victualling incurred by the Master on Charterer's account. Owners to invoice Charterers with supporting documents semi-annually \$ _____
- b) Cost for all telephone calls, radio messages and telegrams sent for Charterer's account. Owners to invoice Charterers with supporting documents semi-annually \$ _____
- c) Cost of all overtime worked at request of Charterer or its Agents. In this connection the Master shall prosecute his voyage with the utmost dispatch and shall render all reasonable assistance with the Vessel's crew and equipment, overtime of Officers and Crew to be worked at request of Charterer or its Agents. \$2000.00/mo.
- d) [Deleted material] \$ _____

DEFAULT OF PAYMENT

7. In default of punctual and regular payment as herein specified, the Owner will notify the Charterer whereupon the Charterer shall make payment of the amount due within ten (10) days of receipt of notification from the Owner, failing which the Owner will have the right to withdraw the vessel from the service of the Charterer, without prejudice to any claim the Owner may otherwise have on the Charterer under this charter.

8. The Owner warrants that the Vessel is capable of maintaining and shall maintain throughout the period of this Charter Party on all sea passages from Seabuoy to Seabuoy a guaranteed average speed under moderate weather conditions of about 15 knots understood to mean no less than $14\frac{1}{2}$ and no more than $15\frac{1}{2}$ for adjustment of hire, in a laden condition and in ballast (speed will be determined by taking the total miles at sea divided by the total hours at sea as shown in the log books excluding stops at sea and any sea passage covered by an off hire calculation) on a guaranteed daily consumption of minimum 145 maximum 155 tons of (2,240 lbs.) of Bunker C/[deleted material].

The Charterer is entitled to the full capabilities of the Vessel and the Owner warrants that the Vessel is capable of discharging a cargo of petroleum against a back pressure of 100 PSI at ship's rail at the following average rates. (excluding stripping) (maximum two grades simultaneously)

CARGO

Light petroleum SG.85 (viscosity less than 320 SSU at 100 degrees F) 113,000 bbls./hr.

Medium petroleum SG.76 (viscosity of 320 to 3200 SSU at 100 degrees F) 113,000 bbls./hr.

Heavy petroleum SG.98 (viscosity above 3200 SSU at 100 degrees F) 111,000 bbls./hr.

Charterer is to be compensated at \$667.73 per hour or prorata for each part of an hour that Vessel takes in excess of the pumping rates as stipulated above. The Owner understands and agrees that he will receive no credit or compensation if the Vessel is able to discharge at a rate greater than those specified

above. Any delay to Vessel's discharge caused by shore conditions shall be taken into account in the assessment of pumping performance. Pumping performance shall be reviewed in accordance with Clause 9a.

ADJUSTMENT OF HIRE

9. a) The speed and and consumption guaranteed by the Owner in Clause 8 will be reviewed by the Charterer after three calendar months, counting from the time of delivery of the Vessel to the Charterer in accordance with this Charter Party and thereafter at the end of each three (3) calendar month period. If at the end of each twelve (12) calendar month period (or at any time during the term of this charter) it is found that the vessel has failed to maintain as an average during the preceding twelve (12) calendar months period (or for any other twelve month period during the term of this charter) the speed and/or consumption warranted, the Charterer shall be retroactively compensated in respect of such failings as follows:

b) Speed—Payment to Charterer of \$to be equitably adjusted per hour or prorata for each part of an hour that Vessel steams in excess of the equivalent time Vessel would have taken at the guaranteed speed warranted in Clause 8 as calculated in accordance with Attachment I—"Performance Calculations".

c) Consumption—The Owner to reimburse the Charterer for each ton of 2,240 lbs. or prorata for part of a ton in excess of the guaranteed daily consumption for main engine [Deleted Material] including any excess not borne by the Owner in accordance with the off hire clause of this Charter Party at the Charterers' contract price for the particular grade of oil at port of supply for the total period under review [Deleted Material]. To the extent the Vessel's speed is less than that warranted, fuel consumption allowed will be determined in accordance with Attachment I—"Performance Calculations".

- d) The basis for determining the Vessel performance in a and b above shall be the statistical data supplied by the master in accordance with Clause 23.
- e) Owner to have similar privileges under this Clause for receiving compensation as Charterers do should Vessel performance as concerns speed be in excess or consumption for propulsion be below the descriptions cut-lined herein.
- f) The Charterer shall provide Owner with an opportunity to review any claim submitted by Charterer under this Clause, and the Owner shall complete such review, and provide Charterer with the results thereof within 30 days from the date such claim was mailed by Charterer to Owner. Charterer may deduct from hire any amount to which it is entitled under this Clause after the expiration of 40 days from the date of Charterer's mailing of a claim relating thereto to Owner.

In the event of Charterer having a claim in respect of Vessel's performance during the final year or part of the Charter period and any extension thereof, the amount of such claim shall be withheld from Hire Payment in accordance with Charterer's estimate made about two months before the end of the Charter period and any necessary adjustment after the end of the Charter shall be made by the Owner to the Charterer or the Charterer to the Owner as the case may require.

REDELIVERY ESTIMATED PAYMENT

10. Should the Vessel be on her voyage towards the port of redelivery at the time a payment of hire becomes due, said payment shall be made for such length of time as the Owner or its Agents and the Charterer or its Agents may agree upon as the estimated time necessary to complete the voyage, [Deleted Material] and less estimated value of fuel in bunkers at the termination of the voyage, and when the Vessel is redelivered to Owner any difference shall be refunded to or paid by the Charterer as the case may require. Charterers to give 60 days notice of redelivery date.

OFF-HIRE

11. In the event of less of time from deficiency of men or stores, breakdown of machinery, interference by Authorities, collision, stranding, fire or other accident or damage to the Vessel, not caused by the fault of the Charterer, preventing the working of Vessel for more than twelve consecutive hours, or in the event of loss of time from breach of orders or neglect of duty by the Master, Officers or Crew, or from deviation for the purpose of landing any injured or ill person on board other than any who may be carried at Charterer's request, payment of hire shall cease for all time lost until the Vessel is again in an efficient state to resume her service and has regained a point of progress equivalent to that when the hire ceased here under; cost of fuel consumed while the Vessel is off hire hereunder, as well as all port charges, pilotages and other expenses incurred during such period and consequent upon the putting in to any port or place other than to which the Vessel is bound, shall be borne by the Owner; but should the Vessel be driven into port or at anchorage by stress of weather or on account of accident to or other consideration for her cargo, such loss of time, shall be for Charterer's account. If upon the voyage the speed of the Vessel be reduced, or her fuel consumption increased, by breakdown, casualty, or inefficiency of Master, Officers or Crew, so as to cause a delay of more than twenty-four hours or an excess consumption of more than one day's fuel, hire for the time lost and cost of extra fuel consumed, if any, shall be borne by the Owner. Any delay by ice or time spent in quarantine shall be for Charterer's account, except delay in quarantine resulting from the Master, Officers or Crew having communications with the shore at an infected port, where the Charterer has given the Master adequate written notice of the infection, which shall be for Owner's account, as shall also be any loss of time through detention by authorities as a result of charges of smuggling or of other infraction of law by the Master, Officers or Crew. Notwithstanding the foregoing provisions no time will be allowed Owner in excess of 144 hours annually.

CHARTERERS' ELECTION

12. The time the Vessel is off hire during the original term of this Charter or any extension thereof, pursuant to the pro-

visions of this Charter, shall be added to the original term or the extension during which the time off occurs, if the Charterer so elects and gives the Owner written notice of such election at least 90 days prior to expiry of the original term or extension during which the time off occurs, but time off during the original term may not be added to any extension thereof.

LOSS OF VESSEL

13. Should the Vessel be lost or become a constructive total loss, hire shall cease on the day of her loss or constructive total loss, and if missing, from the date when last heard of, and any hire paid in advance and not earned shall be returned to the Charterer. If the Vessel is missing or off hire at the time when hire becomes payable, payment of said hire shall be suspended until safety is ascertained or the off hire period ceases.

LIENS

14. The Owner shall have an absolute lien on all cargoes and subfreights for all amounts due under this Charter, and Charterer shall have a lien on the Vessel for all moneys paid in advance and not earned and for the value of fuel in bunkers.

DETENTION BY LEGAL ACTION

15. In the event of detention of the Vessel by Authorities at home or abroad in consequence of legal action against the Vessel or Owner whereby the Vessel is rendered unavailable for Charterer's service for a period of 60 days, unless brought about by the act or neglect of the Charterer, the Charterer, by prompt written notice, shall have the election to cancel this Charter or to suspend same until the service can again be resumed, without prejudice to any right of claim for damage which the Charterer may have in the premises. Payment of hire to cease during time the Vessel may be out of Charterer's service by the cause mentioned in this clause, unless the time out is less than 24 hours in which event there is to be no interruption in hire payments.

DRYDOCKING

16. a) Owner, at its expense, shall drydock, clean and paint Vessel's bottom, and make all overhaul and other nec-

essary repairs at approximately twelve (12) month intervals for which purpose Charterer shall allow Vessel to proceed to an appropriate port. Owner shall be solely responsible, therefor, and also for gasfreeing the Vessel, upon each occasion. All towing, pilotage fuel, water and other expenses incurred while proceeding to and from, and while in drydock, shall also be for Owner's account.

b) In case of drydocking pursuant to this clause at a port where Vessel is to load, discharge or bunker, under Charterer's orders, hire shall be suspended from the time the Vessel receives free pratique on arrival, if in ballast, or upon completion of discharge of cargo, if loaded, until Vessel is again ready for service. In case of drydocking at a port other than where Vessel loads, discharges, or bunkers, under Charterer's orders, the following time and bunkers shall be deducted from hire: Total time and bunkers including repair port call for the actual voyage from last port of call under Charterer's orders to next port of call under Charterer's less theoretical voyage time and bunkers for the direct voyage from said last port of call to said next port of call. Theoretical voyage will be calculated on the basis of the seabuoy to seabuoy distance at the warranted speed and consumption per clause 8.

OWNER TO PROVIDE

17. The Owner shall provide and pay for all provisions, deck and engine room stores, galley and cabin stores and galley and crew fuel, and insurance on the Vessel; wages of the Master, Officers and Crew; consular fees pertaining to the Master, Officers and Crew, and all fresh water used by the Vessel.

OWNER GUARANTEES

18. The Owner guarantees the Vessel is constructed and equipped to carry four grades only two grades may be loaded or discharged simultaneously of oil. If for any reason Vessel, upon arrival at loading port, is unable to load the required number of grades, Charterer will do its utmost to provide a suitable

cargo consistent with Vessel's capabilities; however, if this is not possible Vessel is to proceed to the nearest repair port in ballast and repair all bulkhead leaks necessary, any time and expense being for Owner's account.

FUEL PORT CHARGES ETC

19. The Charterer (except during the period when the Vessel is off hire) shall provide and pay for all fuel except for galley and Crew as provided in Clause Seventeen (17). The Charterer shall also pay for all port charges, light dues, dock dues, Panama and other Canal dues, pilotage, consular fees, except those pertaining to Master, Officers and Crew, tugs necessary for assisting the Vessel in, about and out of port for the purpose of carrying out this Charter, agencies, commissions, expenses of loading and unloading cargoes, and all other charges whatsoever except those herein stated as payable by the Owner. The Owner shall, however, reimburse the Charterer for any fuel used or any expenses incurred in making a general average sacrifice or expenditure, and for any fuel consumed during drydocking or repair of the Vessel.

BUNKERS

20. The Charterer shall accept and pay for all oil fuel in the Vessel's bunkers upon commencement of hire, and the Owner shall pay for all oil fuel in the Vessel's bunkers on the expiry of this Charter at Charterers' current contract prices of the ports where the hire begins and ends respectively, or at Charterers' current contract notices at the nearest recognized port where they may be secured.

Maximum Bunker Fuel Oil on delivery and redelivery shall be as per mutual agreement.

DUTIES OF THE MASTER

21. The Master, although appointed by the Owner, shall be under the orders and direction of the Charterer as regards employment of the Vessel, Agencies, or other arrangements.

MASTER AND OFFICERS

22. If the Charterer shall have reason to be dissatisfied with the conduct of the Master, or Officers, the Owner shall, on receiving particulars of the complaint, investigate it, and if necessary make a change in the appointments.

INSTRUCTIONS/SAILING DIRECTIONS

23. The Master shall be furnished by the Charterer, from time to time, with all requisite instructions and sailing directions, and both he and the Engineers shall keep full and correct logs of the voyages, which are to be patent to the Charterer and its Agents, and abstracts of which are to be sent to the Charterer from each port of call.

BILLS OF LADING

24. Bills of Lading are to be signed at any rate of freight the Charterer or its Agents direct, without prejudice in this Charter, the Master attending daily, if required, at the offices of the Charterer or its Agents, to do so. However, at Charterer's option, Charterer and/or its Agents may sign Bills of Lading on behalf of the Master. The Charterer hereby agrees to indemnify the Owner against all consequences or liabilities that may arise from the Master, Charterer, or its Agents signing Bills of Lading or other Documents inconsistent with this Charter, or from any irregularity in papers supplied by the Charterer or its Agents, or from complying with its or its Agent's orders.

USE OF VESSEL

25. The whole reach and burthen of the Vessel (but not more than she can reasonably stow and safely carry) shall be at the Charterer's disposal, reserving proper and sufficient space for Vessel's Officers, Crew, Master's cabin, tackle, apparel, furniture, fuel, provisions and stores[,] and required spare parts.

GRADES

26. The Master will not unreasonably apply a maximum rate per hour or number of grades when loading cargo. Supplier will be able to load the Vessel at the rates they deem necessary

having due regard to the safety of the Vessel. If requested by Charterer, the Master will agree to discharge more than one grade simultaneously, provided the Master is satisfied the Vessel's pumps and cargo lines are in a condition to permit such discharge. Should at any time the condition of the Vessel's pumps and cargo lines not permit loading and/or discharge of more than one grade simultaneously, the Owner will agree to carry out necessary repairs as early as possible to enable the Vessel to load and/or discharge more than one grade simultaneously.

BREAK BULK CARGO

27. [Deleted Material]

EQUIPMENT

28. The Charterer, subject to the Owner's approval, shall be at liberty to fit any additional pumps and/or gear for loading or discharging cargo it may require beyond what is on board at the commencement of the Charter, and to make the necessary connections with steam or water pipes, such work to be done at its expense and time, and such pumps and/or gear so fitted to be considered its property, and the Charterer shall be at liberty to remove it at its expense and time during or at the expiry of this Charter; the Vessel to be left in her original condition to the Owner's satisfaction. However, the owners shall equip the vessel with the necessary portable fittings for the cargo and bunkering manifold to accept 8"-10" or 12" ASA standard loading and discharging hoses or loading arms. In addition, 60,000 DWT vessels and upward shall have abroad 14" and 16" fittings.

CONDITION OF TANKS

29. Vessel is to be redelivered to the Owner at the expiry of this Charter in a clean or dirty condition at Charterer's option.

PREVIOUS CARGOES

30. The last two successive cargoes carried, or to be carried, by the Vessel immediately preceding her entering upon this

Charter consisted, or will consist of Crude Oil and/or Dirty Petroleum Products.

SAFE BERTH

31. [Deleted material] See Clause 31(A).

DAMAGE TO OR CLAIMS ON CARGO

32. The Owner guarantees that the Vessel is constructed and equipped to carry, without admixture, at least four only two grades may be loaded or discharged simultaneously qualities or descriptions of oil; but subject to this, neither the Owner nor the Vessel shall be responsible for any admixture if more than one quality of oil is shipped, nor for leakage, contamination or deterioration in quality of the cargo unless the admixture, leakage, contamination or deterioration results from (a) unseaworthiness existing at the time of loading or at the inception of the voyage which was discoverable by the exercise of due diligence, or (b) error or fault of the servants of the Owner in the loading, care or discharge of the cargo.

INJURIOUS CARGO

33. No injurious cargoes, including acids that are injurious to the Vessel, are to be shipped, nor any voyage to be undertaken or goods or cargoes loaded that would involve risk of seizure, capture or penalty by rulers or governments, [deleted material].

VOLATILE CARGOES

34. [Deleted Material]

NEGLIGENCE OF PILOTS, ETC.

35. Neither the Charterer nor its Agents, nor any of its Associated or Affiliated Companies, nor any of their employees, shall be responsible for any loss, damage or liability arising from any negligence, incompetence or incapacity of any pilot, stevedore, longshoreman or the personnel of any tug or arising from the terms of the contract of employment thereof or for any unseaworthiness or insufficiency of any tug or tugs, launches or other craft, the services for which are arranged by the Char-

terer, and the Owner agrees to indemnify and hold Charterer harmless against any and all such loss, damage or liability but such indemnity shall not exceed the amount to which Owners would have been entitled to limit their liability if they had themselves arranged for such pilots, tug boats or stevedores.

HOUSE FLAG

36. The Charterer shall be allowed to fly its house flag and to paint the Vessel's funnel with its own colors if desired at Charterer's expenses.

LAWS

37. This Charter shall, so far as possible, be governed by the laws of the United States of America, except in cases of general average, which shall be adjusted, stated and settled according to York/Antwerp Rules excluding Rule 22 1974 and, as to matters not provided for by these rules, according to the laws and usages at the port of New York/[deleted] if a General Average statement is required, it shall be prepared at such port or place in the United States of America/[deleted] as selected by the Owner, unless otherwise mutually agreed, by an adjuster appointed by the Owner and approved by the Charterer, who shall attend to the settlement and the collection of the General Average, subject to customary charges. General Average Agreements and/or security shall be furnished by Owner and/or Charterer, and/or owner and/or consignee of cargo, if requested. Any cash deposit begin made as security to pay General Average and/or salvage shall be remitted to the Average Adjuster and shall be held by him at his risk in a special account in a duly authorized and licensed bank at the place where the General Average statement is prepared. Should the Vessel put into a port of distress or be under average, she is to be consigned to the Owner's Agents, paying them the usual charges and commissions.

LIABILITY

38. Any provisions of this Charter to the contrary notwithstanding, the Owner shall have the benefit of all limitations of, and exemptions from, liability accorded to the Owner or Char-

tered Owner of Vessels by any statute or rule of law for the time being in force.

JASON CLAUSE

39. In the event of accident, danger, damage or disaster before or after the commencement of the voyage, resulting from any cause whatsoever, whether due to negligence or not, for which, or for the consequence of which, the Owner is not responsible, by statute, contract or otherwise, the cargo, shippers, consignees, or owners of the cargo shall contribute with the Owner in General Average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred and shall pay salvage and special charges incurred in respect of the cargo. If a salving ship is owned or operated by the Owner, salvage shall be paid for as fully as if the said salving ship or ships belonged to strangers. Such deposit as the Owner or his Agents may deem sufficient to cover the estimated contribution of the cargo and any salvage and special charges thereon shall, if required, be made by the cargo, shippers, consignees or owners of the cargo to the carrier before delivery.

EXCEPTIONS

40. The Vessel, her Master and Owner shall not, unless otherwise in this Charter expressly provided, be responsible for any loss or damage arising or resulting from: any act, neglect, default or barratry of the Master, pilots, mariners or other servants of the Owner in the navigation or management of the Vessel; fire, unless caused by the personal design or neglect of the Owner; collision, stranding, or peril, danger or accident of the sea or other navigable waters; saving or attempting to save life or property; wastage in weight or bulk, or any other loss or damage arising from inherent defect, quality or vice of the cargo; any act or omission of the Charterer or Owner, shipper or consignee of the cargo, their Agents or representatives; insufficiency of packing; insufficiency or inadequacy of marks; explosion, bursting of boilers breakage of shafts or any latent defect in hull, equipment or machinery; unseaworthiness of the Vessel unless caused by want of due diligence on the part of the Owner to make the Vessel seaworthy or to have her properly

manned, equipped and supplied; or from any other cause of whatsoever kind arising without the actual fault or privity of the Owner. And neither the Vessel, her Master or Owner, nor the Charterer, shall, unless otherwise in this Charter expressly provided, be responsible for any loss or damage or delay or failure in performing hereunder arising or resulting from:—act of God; act of war; perils of the seas; act of public enemies, pirates or assailing thieves; arrest or restraint of princes, rulers or people, or seizure under legal process provided bond is promptly furnished to release the Vessel or cargo; strike or lockout or stoppage or restraint of labor from whatever cause, either partial or general; or riot or civil commotion. Vessel shall have liberty to sail with or without pilots, to tow or to be towed, to go to the assistance of vessels in distress and to deviate for the purpose of saving life or property or of landing any ill or injured person on board. This clause is not to be construed as in any way affecting the provisions for cessation of hire as provided in this Charter.

SALVAGE

41. All salvage moneys earned by the Vessel shall be divided equally between the Owner and the Charterer after deducting Master's, Officers' and Crew's share, legal expenses, hire of Vessel during time lost, value of fuel consumed, repairs of damage, if any, and any other extraordinary loss or expense sustained as a result of the service, which shall always be a first charge on such money.

WAR CLAUSES

42. No contraband of war shall be shipped, but Petroleum and/or its products shall not be deemed contraband of war for the purpose of this clause unless shipped or intended to be shipped to or intended for a country involved in war; nor shall the Vessel be required to enter any port that is in a state of blockade, or where hostilities are in progress, or any war zone, or zone deemed a danger zone in consequence of the existence of war, or actual hostilities, without the consent of the Owner, and if such consent be given then the Charterer will pay the cost of insuring the Vessel against all war risks in an amount

equal to the value under her ordinary policy but not more than \$25,000,000.00.

WAR-WAGES ETC.

43. In the event of the existence of war, or actual hostilities and the continuance of this Charter, the Charterer shall assume the proved additional cost of wages and insurance properly incurred in connection with the Master, Officers and Crew as a consequence of such war or actual hostilities.

REQUISITION

44. Should the Vessel be requisitioned by any Government or Governmental Authority during the period of this Charter, she shall be off hire hereunder during the period of such requisition, and any hire or other compensation paid in respect of such requisition shall be for the Owner's account. The time the Vessel is on any such requisition shall count as part of the period provided in Clause Three (3) of this Charter.

CHAMBER OF SHIPPING

45. Chamber of Shipping War Risks Clauses (Tankers) 1952, as attached, are deemed to be incorporated in this Charter Party.

LAY-UP

46. [Deleted Material] See Clause 46(A).

DAMAGES

47. Damages for breach of this Charter shall include all provable damages and all costs and attorney fees incurred in any action or proceeding hereunder.

DEMISE

48. Nothing herein contained shall be construed as creating a demise of the Vessel to the Charterer.

CLAUSE PARAMOUNT

49. All Bills of Lading issued hereunder shall have effect subject to the provisions of the Carriage of Goods by Sea Act

of the United States, approved April 16, 1936, which shall be deemed to be incorporated therein, and nothing therein or herein contained shall be deemed a surrender by the Owner of any of its rights or immunities or an increase of any of its responsibilities or liabilities under said Act. If any term of any Bill of Lading issued hereunder be repugnant to said Act to any extent, such term shall be void to that extent but no further.

BOTH TO BLAME CLAUSE

50. If the Vessel comes into collision with another ship as a result of the negligence of the other ship and any act, neglect or default of the Master, mariner, pilot or the servants of the Owner in the navigation or in the management of the Vessel, the owners of the cargo carried hereunder shall indemnify the Owner against all loss or liability to the other or non-carrying ship or her owners in so far as such loss or liability represents loss of, or damage to, or any claim whatsoever of the owners of said cargo, paid or payable by the other or recovered by the other or non-carrying ship or her owners as part of their claim against the carrying ship or Owner. The foregoing provisions shall also apply where the owners, operators or those in charge of any ships or objects other than, or in addition to, the colliding ships or object are at fault in respect of a collision or contact.

OIL POLLUTION AVOIDANCE

51. The Owner agrees to participate in Charterer's program covering oil pollution avoidance work in Charterer's own vessels. Such program prohibits discharge overboard of all oily water, oily ballast or oil in any form of a persistent nature, except under extreme circumstances whereby the safety of the Vessel, cargo or life at sea would be imperiled.

Upon notice being given to the Master by radio or other means that Oil Pollution Avoidance controls are required, the Master will contain on board the Vessel all oily residues from consolidated tank washings, dirty ballast etc., in one compartment after separation of all possible water has taken place.

The oil residues will be pumped ashore at the loading or discharging terminal, either as segregated oil, dirty ballast,

commingled with cargo or as is possible for Charterer to arrange with each cargo.

If the Charterer requires that demulsifiers shall be used for the separation of oil/water, such demulsifiers shall be supplied by Charterer at its expense.

The Owner agrees to instruct the Master to furnish Charterer with a report covering oil pollution avoidance for each voyage of the Vessel throughout the Charter Party period.

ARBITRATION

52.-53. [Material cut off] and all differences and disputes of whatsoever [word cut off] out of this Charter shall be put to arbitration in the City of New York pursuant to the laws relating to arbitration there in force, before a board of three persons, consisting of one arbitrator to be appointed by the Owner, one by the Charterer, and one by the two so chosen. The decision of any two of the three on any point or points shall be final. Either party hereto may call for such arbitration by service upon any officer of the other, wherever he may be found, of a written notice specifying the name and address of the arbitrator chosen by the first moving party and a brief description of the disputes or differences which such party desires to put to arbitration. If the other party shall not, by notice served upon an officer of the first moving party within twenty days of the service of such first notice, appoint its arbitrator to arbitrate the dispute or differences specified, then the first moving party shall have the right without further notice to appoint a second arbitrator, who shall be a disinterested person with precisely the same force and effect as if said second arbitrator has been appointed by the other party. In the event that the two arbitrators fail to appoint a third arbitrator within twenty days of the appointment of the second arbitrator, either arbitrator may apply to a judge of any court of maritime jurisdiction in the city above-mentioned for the appointment of a third arbitrator, and the appointment of such arbitrator by such Judge on such application shall have precisely the same force and effect as if such arbitrator had been appointed by the two arbitrators. Until such time as the arbitrators finally close the hearings either party shall have the right by written notice served on the arbitrators and on an

officer of the other party to specify further disputes or differences under this Charter for hearing and determination. Awards made in pursuance to this clause may include costs, including a reasonable allowance for attorney's fees, and judgment may be entered upon any award made hereunder in any Court having jurisdiction in the premises.

SUBLET

54. Charterer shall have the right to sublet the Vessel and to assign the charter to any subsidiary or affiliate corporation. However, Charterer shall always remain responsible for the fulfillment of this Charter in all its terms and conditions.

TOVALOP

55. [Deleted Material] P&I TOVALOP CLAUSE as attached is deemed incorporated in this Charter Party.

MARGINAL HEADINGS

56. The marginal headings in this document are not part of this Charter Party and are not relevant to its interpretation.

Clauses 57 through 64 inclusive are deemed to be incorporated in this Charter Party.

IN WITNESS WHEREOF, THE PARTIES HAVE CAUSED THIS CHARTER TO BE EXECUTED IN DUPLICATE THE DAY AND YEAR HEREIN FIRST ABOVE WRITTEN.

UNITED CARRIERS, INC.

[Signed]

Witness to Signature of

[Signed]

AMERADA HESS SHIPPING
CORPORATION

[Signed]

Witness to Signature of

[Signed]

EXHIBIT 1(D)—U.S. MARITIME ADMINISTRATION TELEX TO UNITED KINGDOM AND ARGENTINA DATED JUNE 3, 1982 ADVISING OF U.S. "INTEREST VESSELS"

DISPATCH [time & date stamp illegible]

VZ[ZCBEA582

PTTUZYUW RUEBBEAZ316 154 1329-UUUU—RUEHC

RUEHLD RUESUA RUESBA.

ZNR UUUUU

P [1330Z JUN 82

FM MARAD WASHDC//SHEAR MARITIME

ADMINISTRATOR//

TO ZEN/MOD UK NAVY LONDON

ZEN/EMBASSY OF ARGENTINA WASHINGTON DC

IN[D RUEHC/SECSTATE WASHINGTON DC

RUEHC/DEPT OF STATE WASHINGTON DC //EB/TT/MA//

RUESUA/AMCONSUL RIO DE JANEIRO //MARITIME

ATTACHE//

RUESSA/AMEMBASSY BUENOS AIRES

BT

UNCLAS SITE MARAD *A-0316

1. THE FOLLOWING U.S. FLAG MERCHANT VESSELS ARE SCHEDULED TO TRANSIT THE VICINITY OF THE FALKLAND ISLANDS AS INDICATED:

NAVE/IRCS LAST POSITION/COURSE DESTINATION
SPEED/DATE

SANTA MARIA/KAFC ENROUTE SANTOS, BR

ETA 3 JUNE

ETA BUENOS AIRES, AR

4 JUNE. ESTIMATED

VICINITY EXCLUSION

ZONE 7-8 JUNE TO

TRANSIT STRAIT OF

MAGELLAN EN ROUTE

VALPARAISO, CI.

2. THE FOLLOWING U.S. FLAG MERCHANT VESSELS ARE SCHEDULED TO CALL AT ARGENTINE PORTS AS FOLLOWS:

JA- 60

NORMADDRACO/ WWSO	ARRIVED BURNOS AIRES, AR 31 MAY	ETD BUENOS AIRES, AR, 2 JUNE
----------------------	--	------------------------------------

NORMADRIGEL/ WWSF	ETA SANTOS, BR, 9 JUNE	ETA BUENOS AIRES, AR, 12 JUNE
----------------------	---------------------------	-------------------------------------

3. THE FOLLOWING LIBERIAN-FLAG TANKERS ARE
CARRYING ALASKAN OIL TO THE U.S. VIRGIN ISLANDS
VIA CAPE HORN:

NORTHERN LION/AJE	EN ROUTE VALDEZ, AL TO ST CROIX, VI	ETA EXCLUSION ZONE 7-10 JUNE
----------------------	---	------------------------------------

HERCULES/ 6ZAB	ENROUTE ST CROIX, VI TO VALDEZ, AL	ETA EXCLUSION ZONE 8-11 JUNE
-------------------	--	------------------------------------

JA- 61

**EXHIBIT 1(E)—TELEX FROM MASTER DATED JUNE
11, 1982 CONFIRMING TIME AND POSITION OF SHIP
DURING ATTACKS**

001906 82JN [illegible]

R357
RX-TLX 1943 EST O 11/82

VIA COMSAT
06/11 232ZZ
AMFRHESS NYK

AMERHESS—CHARTERER—NEWYORK
FM HERCULES 6/11/82

Y6/11 ATTACKED BY UNIDENTIFIED WAR PLANES
JUNE EIGHT 1982 FIRST ATTACK AT 1350 GMT PO-
SITION ACCURATE BASED SATELLITE

FIX 4610S 4930W

SECOND ATTACK 1430 GMT POS. 4616S 4925W

THIRD ATTACK 1625 GMT POS. 4608S 4855W

MASTER HERCULES

AMERHESS NYK A

DIAL 607 FOR MARISAT TELEX

THEY DISC.

ELAPSED TIME 00:01:40

**EXHIBIT 1(H)—TELEX FROM MASTER CONCERNING
ATTACK RELAYED TO U.S. MARITIME
ADMINISTRATION DATED JUNE 9, 1982**

“MARAD gave G-TGC this tlx”
[Handwritten]
82 JUN 11 AM 11:33

MARAD WSH
1720 EDT

B420347 MOC UI
1200EDT JUNE 10/82 HW RH/MGMT
TO MARITIME ADMINISTRATION WASHINGTON,
D.C.

FOR ADMIRAL HAROLD E. SHEAR
FOLLOWING CABLE RECEIVED FROM MASTER
HERCULES QUOTE

TO MOC NEWYORK
FM HERCULES 6/9/82

URGENT—
JUNE 6TH AT 1218 GMT OSL PACHECO RADIO
FOLLOWING MESSAGE
AMVER - GENERAL PACHECO-LIBERIAN TANKER
HERCULES 6ZAB POSITION LAT 4548S LONG.
4929W

TIME 1215 GMT COURSE 193 SPEED 16.3 EN-
ROUTE FROM RIO DE JANEIRO TO VALDEZ
ALASKA VIA CAPE HORN UNQUOTE
AT 1300GMT AIR RECONNAISSANCE BY FOUR
TURBO PROPELERS PLANE

AT 1344 QSL FROM PACHECO RADIO FOLLOWING
MESSAGE QUOTE LIBERIAN HERCULES 6ZAB 2
46.0S 49.5W 081250Z SPEED 16.2 STOP FROM
ABOVE POSITION PROCEEDING TO 56.20S 5000W
TO 56.20S 7000W THENCE RHUMB LINE TO VAL-
DEZ ALASKA

RGDS - MASTER UNQUOTE

AT ABOUT 1350 GMT POSITION 46.10S 49.30W
WHILE STEERING 131 ATTACKED FIRST TIME BY
UNIDENTIFIED FOUR PROPELLERS ANTISUB/AM-
PHIB. PLANE DROPPING EIGHT BOMBS (WE
THINK DEPTH BOMBS) FOUR FROM EACH OF
THE PLANE'S WING, HITTING VESSEL ON PORT-
SIDE, HULL, DECK DERICKS RADIO ANTENNAS
ETC.. BY THE SHOCKS OF EXPLODING BOMBS,
ENGINE TRIPPED, RESUMED THE FULL SPEED
IMMEDIATELY, AND VARIOUS COURSES. WE
WERE FLYING THE LIBERIAN FLAG, AND AFTER
ATTACK HOISTED ALSO WHITE FLAG.

AT ABOUT 1430 GMT POS. 4616S 4925W WE WERE
ATTACKED A SECOND TIME BY THE SAME
PLANE WITH EIGHT BOMBS WHICH EXPLODED
AT SEA NEAR POOP ON STBD SIDE, WHILE
STEERING COURSE 046.

EXHIBIT 1(I)—U.S. COAST GUARD RECORD OF ATTACK

Wednesday, 09 June 1982

The war in the South Atlantic expanded in scope yesterday morning, as the first non-combatant merchant vessel came under attack by unidentified aircraft. Both Argentina and Great Britain disclaim the aircraft as being theirs. The Liberian registered VLCC HERCULES was enroute from St. Croix to Alaska, in ballast, when it was bombed 480 miles northeast of the Falklands.

The HERCULES was first circled for over an hour by a 4 engine propeller aircraft before it dropped depth charges on the 1076 foot vessel. Two hit the deck while others struck the starboard side. A second attack was then made by an ASW-type aircraft which dropped three more depth charges. Damaged, and listing 5 to 6 degrees, but in no immediate danger of sinking, the vessel altered course for Rio de Janeiro.

The relative calm in the aftermath of the second assault was suddenly broken after two hours as 3 jet aircraft attacked the ship. One plane fired two rockets at the HERCULES, scoring one hit. The rocket holed the main deck, but may not have exploded, and could be lodged below deck.

Following this third and final attack the master was advised by Argentine authorities via 2182 kHz "To make for the nearest Argentine port or be fired upon". The master explained his situation and was granted permission to proceed without diverting. COMLANTAREA advised RCC FALMOUTH (UK) and RCC BUENOS AIRES (AR) of the HERCULES non-combatant status and situation, while the State Department was also in contact with the two belligerents. HMS HYDRA, a British hospital ship, diverted to assist but was advised by HERCULES that none of

the 30 crewmen were injured, and that assistance was not needed.

Late last night the master confirmed that the vessel was in no immediate danger though still listing 5 to 6 degrees, and was enroute Rio at 15 knots.

EXHIBIT 1(J)—PRESS STATEMENT**MOD PRESS STATEMENT—9TH JUNE 1982**

We have been asked by the Americans—and we understand that Argentina has been asked as well—whether there is any further information we can give on the attacks on the US leased tanker Hercules yesterday.

The Master of the tanker referred to two attacks by high winged, four engined, propeller driven aircraft. We have already made clear that no British aircraft was involved in any way in this incident and that the Hercules which was in fact in ballast—that is empty—had not at any time been involved in supplying our Task Force.

It will have been noted however that as announced on 2nd June one of our own tankers was attacked by an Argentine C130 some days ago in the same general area. That attack was unsuccessful. The C130 is a high winged, four engined, propeller driven aircraft.

One other piece of information we have which is relevant is a message sent en clair, in English and on an international distress frequency—2182 Kilohertz. This message was picked up by our hospital ships UGANDA and HYDRA. It was preceded by the call sign of an Argentine radio station (we think in Ushumia) and specifically addressed to Hercules with her call sign. This call sign fully identifies the vessel and means that there could have been no doubt as to the nature of the ship or her nationality. The message which was repeated for 30 minutes is as follows:

"Steer course 270 west to make Argentine port. If cannot make Argentine port you will be attacked in 15 minutes time".

The second attack as reported by the Master of Hercules took place [End of document as reproduced in appendix in 2d Cir.]

**EXHIBIT 1(L)—MINISTRY OF DEFENSE REPORT ON
HERCULES ATTACK, DATED JUNE 9, 1983**

From: Mrs. E M McLoughlin, Defence Secretariat 5

MINISTRY OF DEFENCE

Main Building Whitehall London SW1A 2HB

Telephone 01-218 2190 (Direct Dialing)

01-218 9000 (Switchboard)

Messrs Clyde & Co

Bedford Road

Guildford

GU1 4HA

Your reference

PRP/PMH/2.801

Our reference

D/DS5/9/9/17

Date 9 June 1983

Dear Sir,

**HERCULES—AIR ATTACKS IN SOUTH ATLANTIC 9
JUNE 1982**

I am sorry to have been so long in replying to your letter of 12 April. As I said on the telephone to Mr Power on 27 April we have, as you might expect, a fair amount of paperwork covering that period!

The information you request is as follows:

1. The message was heard by all our hospital ships. Their positions as far as we have been able to ascertain were as follows:

UGANDA and HECLA—in the "Red Cross Box" North of Falkland Sound. This was a 10 mile circle around 50° 50' S, 58° 40' W

HERALD—proceeding north five days away from Montevideo.

HYDRA—proceeding south from Montevideo position 41° 30' S, 54° W

HMS HYDRA was despatched to assist until it became clear that the tanker was able to proceed.

2. The message was to call sign 6ZAB (HERCULES' call sign). The message was in English and was "Steer 270 West to make Argentine port. If you cannot make Argentine port you will be attacked in 15 minutes time".

3. The message was repeated several times between about 081720Z and 081800Z on 2182 khz.

4. No reply or other message was heard from the HERCULES.

5. The call sign used in the message was LOV 3 understood to be a station at Ushuaia. The message was heard clearly on voice.

I hope that this answers your questions satisfactorily and I also attach a copy of the MOD press release at the time.

We have not been approached by representatives of the owners of the vessel but should they do so we should, of course, provide the same information.

Yours faithfully,

/s/ [illegible]

EXHIBIT 1(M)—U.S. COAST GUARD FLAG PLOT TELEPHONE LOG

FLAG PLOT TELEPHONE LOG

CASE M/V HERCULES

PAGE

TIME

[HANDWRITTEN:]

2200 DIA advises that they just made MARISAT patch to ship and got following info:

POSN 44-46.55 046-35W/CSC-035°/sp-15K/5-6° List/
NPOC-RIO/CAPT-RENZO BATTAGLIARIN/1 tank
leaking Capt says not in any immediate danger, but
wants non-combatant status reemphasized to UK and
AR (Being done by DOS)

Story on Attack: at 1000 Local 4 eng. prop A/C
painted camafage started circling, at 1115 attacked
with depth charges, 2 hit deck, others hit hull on
starboard. Then ASW type aircraft showed up and
dropped 3 depth charges that landed 200m from
Bridge. 2 hours later three jet A/C arrived and one
fired 2 rockets at ship, one hit.

Master said he received verbal warning on 2182 for
AR. Says he spoke to AR, explained his situation
an damages, and received permission to proceed
without diverting to AR port.

2220 —advised Capt Welling of above said call Capt Black

2226 —advised Capt Black said no need to brief further
up

**EXHIBIT 2--TRANSLATION OF LETTER REPORT OF
REAR ADMIRAL FERNANDO CAMUS SCHERRER,
CHILEAN NAVY, DATED MAY 14, 1985**

Letter No. 4675-2
Punta Arenas, May 14, 1985

Attorney
Mister
Alfonso Ansieta Nunez
Valparaiso

From my consideration:

1. In response to your letter of May 3, 1985, in which you requested information about the call for help to which the S/T "HERCULES" rushed to, May 5, 1982, I can inform you of the following:

a. On May 5, 1982, at 0825 the AP PILOTO PARDO of the National Navy, reached the area of the sinking of the CL BELGRANO initiating communications with the ARA (Navy of the Argentine Republic) BAHIA PARAISO of the Argentine Navy whose captain assumed the post of commander of the rescue area and assigned the search areas.

b. At the end of communications between the AP PARDO and ARA.BAHIA PARAISO, the Captain of the S/T HERCULES that sailed through the area, informed the ARA.BAHIA PARAISO that it continued headed North and it was ahead of its schedule, reason why he offered his cooperation to seek shipwrecked survivors. The ARA.BAHIA PARAISO thanked him and assigned him a search area adjacent to the one of the AP.PARDO, for which both ships maintained contact only for the exchange of information. The AP.PARDO did not give instructions to the S/T HERCULES, since it was not its prerogative to do so.

c. At 2130 of the same day, the S/T HERCULES ended its participation in the search and assumed its original course.

d. The search effected by the S/T HERCULES did not have positive results.

2. On the basis of the disclosed, one can deduce a negative response to the questions formulated by Mr. Burnett in the letter dated February 28, 1985.

Greeting you attentively.

FERNANDO CAMUS SCHERRER
Rear Admiral
Commander in Chief 3rd Naval Zone

**EXHIBIT 4—AMERICAN EMBASSY, MONROVIA,
LIBERIA, TELEX TO SECRETARY OF STATE,
WASHINGTON, D.C. DATED JULY 8, 1982**

Received 8 Jul 02 1252z

UNCLASSIFIED

P 08 105 8Z JUL '82
FM AMEMBASSY MONROVIA
TO SECSTATE WASHDC PRIORITY 3288
INFO AMEMBASSY LONDON
AMEMBASSY BUENOS AIRES
UNCLAS SECTION 01 OF 02 MONROVIA 06814
E.O. 12065: N/A
TAGS: EWWT, LI, US, UK, FA, AR
SUBJECT: ATTACK ON VLCC HERCULES
REFERENCE: MONROVIA 6075

1. IN RESPONSE TO THE EMBASSY'S NOTE OF JUNE 12, 1982 TO THE MINISTRY OF FOREIGN AFFAIRS REGARDING THE JUNE 8 ATTACK ON THE LIBERIAN REGISTERED VESSEL U.S.-CHARTERED VLCC-HERCULES, THE FOLLOWING NOTE WAS RECEIVED ON JULY 7.

2. QUOTE: THE MINISTRY OF FOREIGN AFFAIRS OF THE REPUBLIC OF LIBERIA PRESENTS ITS COMPLIMENTS TO THE EMBASSY OF THE UNITED STATES OF AMERICA AND HAS THE HONOR TO REFER TO THE EMBASSY'S NOTE NO. 291 OF JUNE 12, 1982, CONCERNING THE FORMAL ORAL DEMARCHE WHICH THE U.S. DEPARTMENT OF STATE MADE TO A SENIOR OFFICIAL OF THE ARGENTINE EMBASSY FOLLOWING THE JUNE 8 ATTACK ON THE LIBERIAN REGISTERED VESSEL, US-CHARTERED VLCC HERCULES, AND THE MINISTRY'S SUBSEQUENT NOTE NO. 8615/2-17 OF JUNE 18, 1982 ADVISING THAT IT HAD REQUESTED CLARIFICATION FROM BOTH THE BRITISH AND ARGENTINE GOVERNMENTS.

ALTHOUGH THE MINISTRY HAS NOT YET RECEIVED A REPLY FROM THE ARGENTINE GOVERNMENT, IT WISHES TO QUOTE THE VERBATIM TEXT OF A NOTE RECEIVED FROM HER BRITANNIC MAJESTY'S EMBASSY NEAR MONROVIA CONCERNING THIS MATTER.

"HER BRITANNIC MAJESTY'S EMBASSY PRESENTS ITS COMPLIMENTS TO THE MINISTRY OF FOREIGN AFFAIRS OF THE REPUBLIC OF LIBERIA AND HAS THE HONOR TO REFER TO THE EMBASSY'S NOTE NO. 47 OF 25 JUNE ABOUT THE LIBERIAN-REGISTERED VESSEL HERCULES AND ITS UNDER TAKING TO REVERT TO THE MINISTRY WHEN A REPLY HAD BEEN RECEIVED FROM LONDON.

THE MASTER OF THE HERCULES REFERRED TO TWO ATTACKS BY HIGH-WINGED, FOUR-ENGINED, PROPELLER-DRIVEN AIRCRAFT. HER MAJESTY'S GOVERNMENT HAS ALREADY MADE CLEAR THAT NO BRITISH AIRCRAFT WAS INVOLVED IN ANY WAY IN THIS INCIDENT AND THAT THE HERCULES WHICH WAS IN FACT IN BALLAST—THAT IS EMPTY—HAD NOT AT ANY TIME BEEN INVOLVED IN SUPPLYING THE BRITISH TASK FORCE.

THE MINISTRY WILL NO DOUBT HAVE NOTED, HOWEVER, THAT AS ANNOUNCED ON 2 JUNE 1982 BY THE BRITISH MINISTRY OF DEFENSE, A BRITISH TANKER WAS ATTACKED BY AN ARGENTINE C130 AIRCRAFT, SOME DAYS EARLIER, IN THE SAME GENERAL AREA. THAT ATTACK WAS UNSUCCESSFUL. (THE C130 IS A HIGH-WINGED, FOUR-ENGINED, PROPELLER-DRIVEN AIRCRAFT.)

FURTHER INFORMATION AVAILABLE TO THE BRITISH AUTHORITIES AND WHICH IS RELEVANT TO THE INCIDENT, IS A MESSAGE SENT EN CLAIR IN ENGLISH AND ON AN INTERNATIONAL DISTRESS FREQUENCY-2182 KILOHERTZ. THIS MESSAGE WAS PICKED UP BY THE BRITISH HOSPITAL SHIPS UGANDA AND HYDRA. IT WAS PRECEDED BY THE CALL-SIGN OF AN ARGENTINE RADIO STATION (PROBABLY USHUAIA) AND SPECIFICALLY ADDRESSED TO HERCULES WITH HER CALL-SIGN.

THIS CALL-SIGN FULLY IDENTIFIES THE VESSEL AND MEANS THAT THERE COULD HAVE BEEN NO DOUBT AS TO THE NATURE OF THE SHIP OR HER NATIONALITY. THE MESSAGE WHICH WAS REPEATED FOR THIRTY MINUTES WAS AS FOLLOWS:-

"STEER COURSE 270 WEST TO MAKE ARGENTINE PORT. IF CANNOT MAKE ARGENTINE PORT YOU WILL BE ATTACKED IN FIFTEEN MINUTES TIME."

THE SECOND ATTACK AS REPORTED BY THE MASTER OF THE HERCULES TOOK PLACE SHORTLY AFTER THIS MESSAGE.

HER MAJESTY'S GOVERNMENT HAVE REPORTS FROM OTHER SOURCES THAT THIS BOMBING OF THE HERCULES WAS INDEED CARRIED OUT BY AN ARGENTINE AIRCRAFT."

THE MINISTRY OF FOREIGN AFFAIRS OF THE REPUBLIC OF LIBERIA AVAILS ITSELF OF THIS OPPORTUNITY TO RENEW TO THE EMBASSY OF THE UNITED STATES OF AMERICA THE ASSURANCES OF ITS HIGHEST CONSIDERATION.

THE EMBASSY OF THE UNITED STATES OF AMERICA
MONROVIA, LIBERIA
JULY 5, 1982, UNQUOTE.

**EXHIBIT 5—AMERICAN EMBASSY, MONROVIA,
LIBERIA, TELEX TO SECRETARY OF STATE,
WASHINGTON, D.C. DATED JUNE 10, 1982**

[Stamped:] Received 10 Jun 82 1624z
UNCLASSIFIED

0 101548Z JUN 82
FM AMEMBASSY MONROVIA
TO SECSTATE WASHDC IMMEDIATE 2678
INFO AMERBASSY LONDON IMMEDIATE
INFO AMEMBASSY BUENOS AIRES IMMEDIATE
UNCLAS MONROVIA 05744

E.O. 12065: N/A

TAGS: EWWT, LI, UK, AR, FA, US

SUBJ: ATTACK ON LIBERIAN REGISTRY TANKER

REF: MONROVIA 5694

1. THERE FOLLOWS A PRESS RELEASE ISSUED JUNE 9, 1982 BY THE BUREAU OF MARITIME AFFAIRS, GOVERNMENT OF LIBERIA.

2. QUOTE:

THE BUREAU OF MARITIME AFFAIRS WISHES TO INFORM THE PUBLIC AS FOLLOWS:

THE LIBERIAN TANKER "HERCULES", OFFICIAL NUMBER 3763 WHICH WAS REPORTED ATTACKED AND HIT TWICE BY MILITARY AIRCRAFTS IN THE SOUTHERN ATLANTIC WATERS ABOUT 480 NAUTICAL MILES AWAY FROM THE FALKLAND WAR ZONES, WAS ON A BALLAST VOYAGE FROM RIO DE JANEIRO, BRAZIL TO VALDEZ, ALASKA ON CHARTER.

THE "HERCULES", A 99,827 GROSS TON TANKER WAS BUILT IN 1971, AND IS OPERATED BY MARITIME OVERSEAS CORPORATION OF NEW YORK CITY. THE VESSEL WAS FIRST ATTACKED ON THE MORNING OF JUNE 8 BY A SINGLE FOUR PROPEL-

LOR MILITARY AIRCRAFT WHEN SHE WAS IN THE POSITION 46 DEGREES 30 MINUTES SOUTH, 49 DEGREES 30 MINUTES WEST. A BOMB HIT THE "HERCULES" BUT DID NOT EXPLODE AND FELL INTO THE SEA. THE SECOND ATTACK WAS REPORTED AT 1345 EASTERN DAYLIGHT SAVING TIME THE SAME DAY BY THREE FOUR PROPELLOR MILITARY AIRCRAFTS. THIS TIME THE "HERCULES" WAS HIT BY A ROCKET WHICH DID NOT EXPLODE. THE VESSEL IS CURRENTLY HEADING BACK TO RIO DE JANEIRO IN DAMAGED CONDITION. BY DIRECTIVE OF THE COMMISSIONER, THE MATTER WAS REPORTED TO ADMIRAL SHEAR, MARITIME ADMINISTRATOR OF THE UNITED STATES, THE ESTABLISHED POINT OF CONTACT FOR VESSELS IN DANGER. ADMIRAL SHEAR HAS CONTACTED THE ARGENTINE AND BRITISH GOVERNMENTS TO PREVENT FURTHER ATTACK ON NEUTRAL VESSELS. MEANWHILE, DEPUTY COMMISSIONER GEORGE B. COOPER IS WORKING ALONG WITH AMBASSADOR JOSEPH GUANNU, LIBERIA AMBASSADOR ACCREDITED TO THE UNITED STATES, IN FORMULATING MEASURES TO PREVENT ANY ADDITIONAL ATTACKS ON LIBERIAN VESSELS PLYING INTERNATIONAL WATER. UNQUOTE SWING

10/1320 COPY PASSED TO MARAD []

enclosure (3)

EXHIBIT 6—AFFIDAVIT OF DOUGLAS R. BURNETT

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

**Index No. 85 Civ. 4365 (RLC)
Index No. 85 Civ. 4378 (RLC)**

**AMERADA HESS SHIPPING CORPORATION and,
UNITED CARRIERS, INC.,**

Plaintiffs,

- against -

ARGENTINE REPUBLIC,

Defendant.

**AFFIDAVIT OF
DOUGLAS R. BURNETT**

State of New York)
) ss:
City of New York)

DOUGLAS R. BURNETT, being duly sworn deposes and says:

1. I am an associate with the firm of HILL RIVKINS CAREY LOESBERG O'BRIEN & MULROY, which represents AMERADA HESS SHIPPING CORPORATION ("Amerada Hess") in this litigation.

2. In the course of investigating the June 8, 1982 attack of the S/T HERCULES, we obtained consistent evidence indicating that the armed forces of the Argentine Republic had carried out the attack. Our Investigation Report, to-

gether with supporting documents and Amerada Hess' claim for the value of its lost bunkers is included as Exhibit 1 to the Plaintiffs' Joint Exhibits.

3. On August 3, 1983, this report and its supporting documents, including Amerada Hess' claim for restitution, were hand-delivered to the First Secretary of the Embassy of the Argentine Republic, Dr. Jose Maria Ortegui (Exh. A). The First Secretary assured us that the report would be immediately transmitted to the Argentine Government.

4. On September 29, 1983, November 4, 1983, November 18, 1983, January 23, 1984 and February 8, 1984, we attempted without success to obtain Argentina's position with respect to our claim through the Argentine Embassy (Exh. B).

5. On February 22, 1984, I had a call returned by Dr. Ortegui who informed me that the matter was being handled jointly by the General Counsel of the Ministry of Defense and the Ministry of Foreign Affairs in Argentina. Dr. Ortegui strongly recommended that we retain an Argentine attorney to pursue our client's claim directly with the ministries involved in Argentina (Exh. C).

6. Between February 29, 1984 and March 5, 1984, we were able to retain the distinguished Argentine lawyer, Dr. Jose Domingo Ray (Exh. D). Dr. Ray is an experienced admiralty attorney and a former head of Argentina's delegation to the *Comite Internacional*, a world organization of maritime lawyers. He has also represented his country at the United Nations.

7. On March 14, 1984, Dr. Ray informed us that he had delivered to the Ministry of Foreign Affairs, a copy of the inquiry of the Brazilian Navy which confirmed the neutral status of the *HERCULES* (Exh. 3). In mid-April, 1984, Dr. Ray delivered to the Argentine Government, a formal statement of the case under International Law, a final Demand for Restitution, and Notice of our intention to

proceed under the Alien Tort Statute, 28 USC § 1350 *et seq.*, (1789) [sic] (Exh. D). On May 24, 1984, the Ministry of Foreign Affairs replied and stated, in part:

"To this respect, I inform you that, having in mind the nature of the case, the North American law firm of Hill Rivkins Carey Loesberg O'Brien & Mulroy can send all sort of documents, memorandum, etc. to the Argentine Embassy in Washington D.C., which will make the necessary arrangements to make them arrive at this legal staff."

A copy of this note and the cover letter of Dr. Ray dated June 13, 1984 is included as Exhibit E to this Affidavit. As Dr. Ray noted, "after the note received, there is no doubt that the attempt remains in a dead way." (Exh. E).

8. As the second anniversary of the attack due [sic] near, we became concerned over what we had been informed was a two-year Statute of Limitation for this type of action in Argentina. As previously indicated, Dr. Ray had indicated that he would not be able to represent us in public litigation in Argentina on this claim (Exh. D).

9. On May 31, 1984, telexes were sent to four of the leading international law firms in Argentina as listed in *Martindale Hubbard*. [sic]

10. Our attempt to retain the law firm of Abeledo, Gottheil y Asociados and their reply, attached as Exhibit F to this Affidavit stated, in part:

"We have studied carefully chance of success of a legal action of recovery in Argentine Courts in that we have reached the conclusion that under the circumstance of fact and applicable precedence the case has almost no probability of a positive outcome.

As a consequent, we would feel uncomfortable defending a case the viability of which we do not

see. We regret to tell you that we prefer not to engage in such litigation."

This firm, under cover of a letter dated June 8, 1984, sent an opinion of the National Supreme Court of Justice, dated September 27, 1983 whereby the Court held that it had no jurisdiction for acts committed by government agencies during the war (Exh. F).

11. On June 1, 1984, the firm of Estudio Beccar Varela declined to represent us. Their reply, attached as Exhibit G to this Affidavit, stated, in part:

"Without knowing whether the navigation of the HERCULES in the conflict zone was innocent or not, we may decide if we would consider assisting you in this case, because we are inclined to refrain from acting against our Government in a claim for damages reportedly resulting from war action when hostilities have not yet been officially brought to an end.

Even in the case that the navigation is proven innocent we would feel impeded to act because, as you perhaps know, we are acting as special Argentine counsel for banks in the re-financing of the Argentine foreign debt and are simultaneous representation of a claim in action against the Government in a case that will have large political implications may [sic] create a conflict of interest." (Exh. G).

12. On May 31, 1984, we contacted the law firm of C&C Beccar Varela with respect to representation of our client in this matter. I received a telephone call the following day and after discussing the case with the senior partner of the firm, Dr. Cosme Beccar Varela, this firm agreed to represent Amerada Hess (Exh. H). Immediate arrangements were made to have the file transferred from Dr. Ray's office to the offices of C&C Beccar Varela. The file transfer was accomplished on June 5, 1984.

13. On June 5, 1984, we received a telex from Dr. Varela which stated:

"... we wish to inform you that we have received today afternoon the papers from Edy, Roche y de la Vega and after careful reading, we reach the moral conviction that we cannot defend the case. The facts seem to indicate that the vessel was directed to the English fleet. The geographical position is unexplainable except that, the cargo of usable gasoline and not crude, the lack of clear identification of the aircraft that bombed the ship three times and also circumstantial evidence against the contention of the time charterers, from our personal point of view." (Exh. H).

14. I was shocked to receive the above reply. Dr. Varela, after we had discussed the case in detail on the telephone on June 1, 1985, had been enthusiastic and eager to assist us in this matter. In the period between that conversation and the June 5, 1985 telex, the only documents he had received from Dr. Ray were those contained in Exhibits 1 and 3 of the Plaintiff's Joint Exhibits. A careful reading of these documents shows that there is absolutely no indication that the S/T HERCULES was involved in any way in support of the English fleet or carrying a gasoline cargo. We immediately sent a telex to Varela and demanded to know what document in the file implicated the ship as supporting the English fleet. We received no response.

15. On July 23, 1984, we received a bill from the firm of C&C Cosme Varela for \$2,200.00. On December 5, 1984 we replied and said that before we could instruct our client to pay the invoice, we stated it would be necessary for Dr. Varela to disclose to us the evidence he had which showed the HERCULES was supporting the British fleet.

On December 19, 1984, Dr. Varela replied and stated simply that:

"We have reached the moral conviction that the vessel was directed to the English fleet and, therefore, we couldn't defend the case.

Furthermore, the letter stated:

"As that was not a case for an Argentine, in our opinion, we communicated to you our negative answer . . ." (Exh. H).

16. In reviewing the entire relationship with C&C Becar Varela, I can only infer from the radical change in attitude of the Argentine attorneys, totally unsupported by any documents or other evidence, that someone had intervened with our attorneys and directed them to discontinue their representation of Amerada Hess.

17. An additional attempt to retain another Argentine firm in early June, 1984 also met with no success (Exh. I).

18. Since that time, I have monitored local Argentine magazines, such as *Gente* and *Siete Dias* as well as other international publications to determine if the change in the Government of Argentina would change my conclusion that it would be impossible to find a forum or counsel in Argentina to represent Amerada Hess. In this light, The Rattenbach Commission, the official Argentine Government inquiry into the Malvinas War, completely omitted any reference to the attack on the S/T HERCULES. Based on this monitoring, together with knowledge of the unsuccessful attempt by attorneys for the plaintiff, United Carriers Inc., to obtain recognition and compensation for the owner's claim on March 27, 1985, I am of the firm opinion that it is impossible for Amerada Hess to obtain

"a day in Court" in Argentina or even be represented by competent Argentine Counsel in its claim for restitution, universally recognized under International Law.

/s/ DOUG BURNETT
DOUGLAS R. BURNETT

Sworn to me this 2nd
day of October, 1985.

/s/ CATHERINE FARRAGHER
Notary Public

CATHERINE FARRAGHER
Notary Public State of New York
No. 41-6237075
Qualified in Queen, County
Commission Expires March 30,
1986

EXHIBIT 7—AFFIDAVIT OF RAYMOND J. BURKE, JR.**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

85 CIV 4365 (RLC)

AMERADA HESS SHIPPING CORPORATION,
Plaintiff,

- against -

ARGENTINE REPUBLIC
Defendant.

85 CIV 4378 (RLC)

UNITED CARRIERS, INC.,
Plaintiff,

- against -

ARGENTINE REPUBLIC,
Defendant.

AFFIDAVIT OF
RAYMOND J. BURKE, JR.

State of New York)
) ss.:
County of New York)RAYMOND J. BURKE, JR., having been duly sworn,
deposes and says:

1. I am a member of the firm of Burke & Parsons, attorneys for Plaintiff UNITED CARRIERS, INC. ("United"), and am admitted to practice before this Honorable Court.

2. The facts giving rise to the claim of United are:

(a) S/T HERCULES (the "Vessel") was a steam-turbine crude oil tanker of 220,117 deadweight tons, with a length overall of 1058' and a beam of 158', built by Hitachi Zosen, Sakai, Japan in 1971. She was registered under the laws of the Republic of Liberia and owned by United.

(b) From the opening of the Trans-Alaska Pipeline System ("TAPS") in late 1977 until she was attacked, the Vessel was continuously in the TAPS trade under a time charter to Amerada Hess Shipping Corporation ("Hess Shipping"), an affiliate of Amerada Hess Corporation ("Hess") carrying full cargoes of Hess' share of Alaska North Slope crude oil from Valdez, Alaska to Hess' refinery at St. Croix, U.S.V.I. The Vessel was one of six or seven Very Large Crude Carriers employed by Hess in the TAPS trade. Since there is an exemption to the Jones Act allowing the use of foreign flag vessels between the U.S. Virgin Islands and other U.S. ports, Hess employs foreign flag tankers, all of which are too large to transit the Panama Canal and therefore pass Argentina on all voyages. In fact, on her loaded voyage immediately preceding the ballast voyage during which she was attacked, the Vessel assisted in the search for survivors of the sunken Argentine cruiser GENERAL BELGRANO.

(c) On June 8, 1982, while on a ballast voyage from St. Croix to Valdez, the Vessel was attacked by aircraft at a point approximately 480 miles northeast of the Falkland Islands/Islas Malvinas. After the attacks, the Vessel diverted to Rio de Janeiro [sic], Brazil as a port of refuge.

(d) On June 13, during an inspection of the bomb damage, an undetonated bomb (believed to be a 1,000 pound

bomb) was discovered in No. 2 port wing tank. The Captain of the Port of Rio de Janeiro [sic] was notified and the Vessel was ordered to depart for an unprotected anchorage offshore. Professional salvors (including an American team of explosive ordnance disposal experts) were engaged.

(e) By the time the salvors reached the Vessel, the bomb was under about 40' of water which had entered the tank through the hole in the side shell caused by the bomb's entry. Due to the hazards which would accompany an attempt to remove the bomb (by a "controlled explosion"), it was decided to scuttle the Vessel. Agreement was reached with all interested parties and appropriate Brazilian government officials, and on July 20, 1982, the Vessel was towed from Rio de Janeiro to a point approximately 250 miles from the Brazilian coast and scuttled in 9,000 feet of water.

3. At the time of the attack, limited information was available concerning the nationality of the attacking aircraft and the reason for the attack. According to various publications, such as J. Ethell and A. Price, *Air War South Atlantic* (1983), the Vessel was attacked by an Argentine Force (Fuerza Aerea Argentina) C-130 Hercules transport which had been modified as a bomber. The C-130 was a part of Grupo 1, based in El Palomar but operating out of Comodoro Rivadavia, Argentina. Additional reports surmise that the C-130 was searching for the QE-2 when it located the Vessel by chance.

All known American and British publications correctly report that the Vessel was not a part of the British task force. One such example, R. Villar, *Merchant Ship at War: The Falklands Experience* (1984), stated:

Another incident was when the Liberian-registered tanker *Hercules*, totally unconnected with the Task Force and on peaceful passage some 500 miles north of the Falklands during 8 June, was clearly mistaken by the Argentine Air Force

for a British tanker and bombed and hit. Although these bombs did not go off either, their presence was such a danger that the ship had eventually to be sunk in deep safe water.

4. Attempts were made by Hess Shipping's attorneys to seek restitution from the Argentine Government through both Argentine Counsel and the Argentine Embassy in Washington. Those unsuccessful attempts are described in detail in the affidavit of Douglas R. Burnett, Esq., dated October 2, 1985.

5. United decided to pursue a different avenue by meeting with a senior government official in Buenos Aires. That meeting took place on March 27, 1985 when I met with Dr. Jorge Sabato, Vice-Chancellor, Ministry of Foreign Affairs and Culture. To the best of my knowledge, Dr. Sabato is second in command to the Minister of Foreign Affairs and has responsibility for all matters pertaining to the Falkland Islands/Islas Malvinas.

6. In discussing United's claim, Dr. Sabato advised me that even if it were shown that the Vessel were bombed by Argentine planes (which was denied), he doubted that there existed a "framework" within which to make a settlement payment to us, the only 'framework' being by (i) contract, (ii) regulation involving war reparations (which unfortunately do not apply to the Falkland/Malvinas conflict) or (iii) judgment of an Argentine Court. He telephoned his lawyers who confirmed that view.

7. Dr. Sabato suggested that United, in the absence of either a contract or applicable war reparation regulation, file suit in Argentina which (according to Dr. Sabato) has a ten-year statute of limitations; nevertheless, based upon my personal experience and that of Hess Shipping counsel, it was (and remains) my view that suit in Argentina on behalf of United on a claim arising from the Falkland/Malvinas conflict would have been futile. Attached are articles from two newspapers, Jornal do Brasil and Lloyd's

List, which are representative of many published reports as to the prevailing climate of opinion in Argentina regarding the HERCULES incident. A third excerpt from the New York Times of September 16, 1985 confirms that the Argentine Republic considers the Falkland/Malvinas conflict to be ongoing. Additionally, the inability to obtain competent Argentine counsel, as described in the affidavit of Douglas R. Burnett, Esq., dated October 2, 1985, amounts to an effective foreclosure of both United and Hess Shipping from access to the Argentine courts.

Dated: New York NY
October 9, 1985

/s/ RAYMOND J. BURKE JR.
RAYMOND J. BURKE, JR.

Sworn to before me on
October 9, 1985

/s/ DONNA ORLANDO
Notary Public

DONNA ORLANDO
NOTARY PUBLIC, State of New York
No. 31-4647317
Qualified in New York County
Commission Expires March 30, 1987

**EXHIBIT 11—AFFIDAVIT OF ANTHONY PETER
CLARKE, Q.C. AND NIGEL ROBERT JACOBS**

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

Index No. 85 Civ. 4365 (RLC)
Index No. 85 Civ. 4378 (RLC)

AMERADA HESS SHIPPING CORPORATION and,
UNITED CARRIERS, INC.,

Plaintiffs,

- against -

ARGENTINE REPUBLIC,

Defendant.

**AFFIDAVIT OF ANTHONY PETER CLARKE, Q.C.
and NIGEL ROBERT JACOBS**

We, Anthony Peter Clarke and Nigel Robert Jacobs both of 2 Essex Court, Temple, London EC4Y AP, England, make oath and say as follows:

1. Anthony Peter Clarke holds a degree of Master of Arts from Cambridge University (M.A. Cantab.). He is a barrister and was called to the English bar in July 1965. He has been in full time practice in Chambers at 2 Essex Court since being called to the bar. He is a member of Middle Temple. In 1979 he was appointed a Queen's Counsel (that is, a barrister of not less than ten year's call, appointed by the Queen through the Lord Chancellor). He is a Recorder (a judicial appointment which requires the holder to sit for part of the year and try criminal and small civil cases), a member of the panel of Lloyd's Ar-

bitrators, a member of the panel of Wreck Commissioners, and a supporting member of the London Maritime Arbitrators' Association. He specialises in all aspects of admiralty and commercial maritime law.

2. Nigel Robert Jacobs graduated with a Bachelor of Arts degree and a Master's degree from Cambridge University (B.A. Cantab. and LL.M. Cantab.). He is a barrister and was called to the bar in November 1983. He is in practice in Chambers at 2 Essex Court specialising in all aspects of admiralty and commercial maritime law.

3. We are asked to consider the following questions:—

- (i) What law did the English Prize Courts consider that they were applying in 1789—i.e. domestic or international law?
- (ii) Did Prize Law in 1789 provide for the right of the Owner of a neutral merchant vessel to the payment of compensation if his vessel was destroyed by a British warship on the High Seas in breach of international law?

(i) *International or Domestic Law?*

4. *Halsbury* Vol. 37 (4th Ed., para. 1306) states:—

"Law administered by the Prize Courts. The law administered by the Prize Court is international law which originates in the practice and usage long observed by civilised nations in their relations with each other or in express international agreement."

In the late eighteenth century, the position was identical. The English Prize Courts administered "the law of nations". In *Le Caux v. Eden* (1781) 2 Douglas 594, Buller J. (at 610) stated that:—

"prizes are acquisitions 'jure belli', and the 'jus belli' is to be determined by the law of nations,

and not by the particular municipal law of any country."

5. The rule was repeatedly reaffirmed by Lord Stowell. In *The Maria* (No.1) (1799) 1 C. Rob. 340, he stated that his duty was:—

"not to deliver occasional and shifting opinions to serve present purposes of particular national interest, but to administer with indifference that justice which the law of nations holds out without distinction to independent states, some happening to be neutral and some to be belligerent . . . the law itself has no locality".

In *The Recovery* (1807) 6 C. Rob. 341, 348 he held that:—

"this is a Court of the Law of Nations, thought sitting here under the authority of the King of Great Britain. It belongs to other nations as well as our own; and what foreigners have a right to demand from it, is the administration of 'the law of nations' . . ."

See, also, *The Walsingham Packet* (1799) 2 C. Rob. 77 and *The Elsebe* (1804) 5 C. Rob. 174.

6. The same view was taken by the Courts during the First World War. In *The Odessa* [1915] P.52 at 61, Sir Samuel Evans stated:—

"the law to be administered here is the law of nations, i.e., the law which is generally understood and acknowledged to be the existing law applicable between nations by the general body of enlightened international legal opinion."

This principle was subsequently reasserted by the Privy Council in *The Zamora* [1916] A.C. 77 at 91.

7. Without doubt, therefore, the English Prize Courts considered that they were administering international law or "the law of nations".

(ii) *The Violation of neutrality and the right to compensation*

8. *Halsbury* (supra) at para. 1336 defines the obligations of the captor in the following terms:—

"The primary duty of the captor of an enemy ship . . . is to bring the ship into port for adjudication, so that it may be judicially ascertained if she is enemy property, or neutral property liable to capture, and so prevent mistakes by the captor. Destruction of prize is only allowed when the prize is in such condition as prevents her being sent to any port for adjudication, or when the capturing vessel is unable to spare a prize crew. If the captured ship is neutral or has a licence from the captor's country, she may not be destroyed by the captor; therefore, if a neutral ship or a ship protected by a licence is destroyed, however meritorious such act may be as far as the belligerent state is concerned, the neutral or protected shipowner is entitled to full compensation for the loss of his property."

In our view, this merely represents a refined restatement of the rights and liabilities of the captor imposed by the law in the late eighteenth century. The Report made to King George II in 1753 by the then Judge of the Admiralty Court (Sir George Lee) and the Law Officers of the Crown (including the future Lord Mansfield) is regarded as of seminal importance in relation to the general principles applicable to this issue: *The Ostsee* (1855) 2 Spinks 170 at 171-2; *Story—Notes on the Principles and Practice of Prize Courts* (1854), Edited by Pratt; *The Zamora* (supra). The Report states:—

"The Law of Nations allows, according to the different degrees of misbehaviour or suspicion arising from the fault of the ship taken, and other circumstances of the case, costs to be paid or not to be received by the claimant, in case of acquittal and restitution. On the other hand, if a seizure is made without probable cause, the captor is adjudged to pay costs and damages."

Judge Story (supra) sets out the following principles (at pages 39 and 41):—

"If the capture is made without probable cause, the captors are liable for damages, costs and expenses to the claimants . . .

". . . In respect of the measure of damages, where the vessel and cargo are actually lost, it is usual to allow the actual value of the property."

9. In our opinion, it was well established by the late eighteenth century that a captor was under a duty not to exercise the right of capture (and, 'a fortiori' of destruction) except under reasonable suspicion and on sufficient grounds that the ship or her cargo was subject to condemnation. Where the rights of a neutral owner were infringed—i.e. in normal circumstances, where seizure was improperly made or there was undue delay—the captor became liable for damages, costs and expenses. In other words, every capture was made at the peril of the captor. If a neutral was unjustly deprived of his property, he ought to be put as nearly as possible in the same position as he was before the deprivation took place; in effect, a neutral was entitled to full compensation.

10. This principle is best illustrated by reference to the emergent body of case law in the late eighteenth and early nineteenth century. In *Major Michael Fallijeff v. William Elphinstone* (1784) 5 Brown's Parl. Cases 343, the House of Lords held that a neutral owner was entitled to de-

murrage and damages which may have been sustained by reason of the detention. In *The Juffrow Maria Schroeder* (1800) 3 Rob. 152, Lord Stowell stated:—

“It is not necessary that the captor should have assigned any cause at the time of the capture; he takes at his own peril, and on his own responsibility, to answer in costs and damages for any wrongful exercise of the rights of capture.”

Similarly, Lord Stowell ordered restitution in *The Zee Star* (1801) 4 C. Rob. 71 (two months' demurrage, costs and damages) and in *The Triton* (1801) 4 C. Rob. 78 (one month's demurrage). See, also, *The Corier Maritimo* (1799) 1 C. Rob. 287 and *The Madonna del Burso* (1802 4 C. Rob. 370.

11. It followed logically from the well-established principle that a party unjustly deprived of his property must be put as nearly as possible in the same position as he was before the deprivation took place that, when a neutral's loss manifested itself in the actual loss or destruction of his vessel as a result of the captor's act, the neutral was entitled to full indemnification. *The Mentor* (1799) 1 C. Rob. 177 seems to have been the first case where the Prize Court considered (albeit indirectly) the position of the neutral owner whose vessel had been wilfully but wrongfully destroyed. The issue before Lord Stowell was simply who was to be responsible for the payment of compensation to the neutral owner. That the owner had a right to receive compensation from someone appears to have been implicitly accepted by the Court. Thus, in the *Der Mohr* (No. 1) (1800) 3 C. Rob. 129, a case of negligent loss rather than wilful destruction, the Court directed that restitution be made “in value of the ship”.

12. *The Acteon* (1815) 2 Dods. 48 appears to be the first case before the English Prize Courts directly concerning the wilful destruction of a neutral vessel and the right to

compensation. Lord Stowell applied the general principles of compensation:—

“On the part of the claimants restitution has been demanded, and there can be no doubt that they are entitled to receive it; . . . it remains to be settled what is to be the measure of restitution—how far it is to be carried. The natural rule is, that if a party be unjustly deprived of his property he ought to be put as nearly as possible in the same state as he was before the deprivation took place; technically speaking, he is entitled to restitution, with costs and damages.”

13. This position was subsequently affirmed in *The Felicity* (1819) 2 Dods. 381. Indeed, it was because the reasoning behind *The Acteon* and *The Felicity* was so obvious and followed logically from the earlier decisions on demurrage and damages that Lord Stowell could justifiably state:—

“These are rules so clear in principle and established in practice, that they require neither reasoning nor precedent to illustrate or support them.”

Indeed, in *The Ostsee* (supra), the Privy Council approved the above authorities. In our opinion, notwithstanding that the first “wilful destruction” case was not until 1815, the position in 1789 was that any violation or infringement of the rights of a neutral owner would render the captor liable to the extent of the neutral's loss and deprivation. Accordingly, if that deprivation had taken the form of the loss of the neutral's vessel, the “captor's” liability would have extended to the restitution of the vessel's value.

14. In fact, even before *The Acteon*, this would appear to be the position reached by the U.S. Supreme Court. In *Del Col v. Arnold* (1796) 3 Dall 333, a neutral owner, whose vessel had been scuttled and plundered, was entitled

to "the full value of the property injured, or destroyed". See, also, *Story* (supra) page 41 and the footnotes thereto.

15. It follows that in our opinion the answer to question (ii) posed above is Yes.

Sworn at 15 Devereux Court) /s/ Anthony Clarke
WC2R 3JX)
in the County of London) /s/ Nigel Jacobs
the 27th day of September 1985)

before me,

/s/ [illegible]

A Solicitor

EXHIBIT 12—AFFIDAVIT OF DR. VED P. NANDA

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

85 Civ. 4365 (RLC)

AMERADA HESS SHIPPING CORPORATION,
Plaintiff,
v.
ARGENTINE REPUBLIC,
Defendant.

AFFIDAVIT

I, *Ved P. Nanda*, having been duly sworn on October 9, 1985, hereby state as follows:

I. Alien Tort Act Provides Subject-matter Jurisdiction in the Controversy at Hand

The plaintiff claims that under the Alien Tort Act, codified at 28 U.S. §1350, the district court has subject-matter jurisdiction in the controversy regarding losses allegedly suffered by the plaintiff as a result of bombing attacks by the Argentine armed forces on the M/V *Hercules* during the conflict between Argentina and the United Kingdom in the South Atlantic in 1982. In response to the inquiry whether such jurisdiction is proper following enactment by Congress of the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§ 1330, 1602 *et. seq.*, my answer is in the affirmative; the Alien Tort Act does provide the requisite jurisdictional basis.

The claim in this case arises under the laws of the United States within the meaning of Article III, U.S. Con-

stitution. Article III provides in part: "The judicial Power shall extend to all cases in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties. . . ."

A primary objective of codifying the U.S. sovereign immunity law into the FSIA was to relieve the Department of State from its customary role of determining claims of immunity. (See, e.g., *Verlinden B. V. v. Central Bank of Nigeria*, 461 U.S. 480, 487-88 (1982).) The question is, do pre-FSIA exceptions survive the passage of the Act? My answer is that, at least, the exception claimed by the plaintiff does.

The FSIA appropriately provides several grounds for the maintenance of suits against a foreign state, its political subdivision, and its agencies and instrumentalities in U.S. courts by enumerating specific exceptions to sovereign immunity. However, FSIA is not to be read as the sole jurisdictional basis for suits against foreign states, especially in a case as the present one, where the neutral shipowner has suffered damages over the high seas allegedly by the acts of the sovereign; this action falls squarely within the ambit of the Alien Tort Act.

The Alien Tort Act, with its genesis in the Judiciary Act of 1789 (Judiciary Act §9, 1 Stat. 73, 77 (1789)), which granted the district courts of the United States original jurisdiction, reads: "The district court shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the laws of nations or a treaty of the United States."

The legislative history of the FSIA does not mention the Alien Tort Act by name. However, more recently, the potential of the latter Act in providing recourse to aliens has been recognized. (See, e.g., *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. (1980).)

As is evident from the history of the Tort Claim Act (see Note, *The Law of Nations in the District Courts: Fed-*

eral Jurisdiction Over Tort Claims by Aliens Under 28 U.S.C. §1350, 1 B.C. INT'L & COMP. L. REV. 77 (1977)), the intended purpose of the Act was to provide an individual alleging a tort with a recourse via original jurisdiction in U.S. district courts. After the promulgation of the FSIA and in view of the silence of the FSIA regarding its reach vis-a-vis the Alien Tort Act, it is submitted that the exception the plaintiff claims in the present action survived the passage of FSIA. This is notwithstanding the language in 28 U.S.C. § 1605(a) and the dicta suggesting that the FSIA provisions regarding jurisdiction over a foreign sovereign are exhaustive. (See, e.g., *Verlinden*, 461 U.S. 480 (1982).)

An interpretation of the pertinent provisions of these two Acts, undertaken in light of the purposes of the two Acts, especially in view of the silence of FSIA regarding the Alien Tort Act, leads me to the conclusion that Congress must not have intended to foreclose access to the federal judicial arena to an alien plaintiff whose rights of neutrality have been allegedly violated on the high seas. For among the very few established norms of international law during the 18th century, one unequivocally accepted norm was the right of a neutral shipowner to be free from attack on the high seas.

In order for the jurisdiction to rest under the Alien Tort Act, three elements must be present: (1) the claim must be made by aliens; (2) it must be for a tort; and (3) the tort must be in violation of the law of nations or a treaty of the United States. (See *Hanoch Tel-Oren v. Libyan Arab Republic*, 517 F. Supp. 542, 548 (D.D.C. 1981).) Also, the Alien Tort Act is to be invoked only in extraordinary circumstances. (See *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975); *De Wit v. KLM Royal Dutch Airlines N.V.*, 570 F. Supp. 613, 618 (S.D.N.Y. 1983).) This action meets these requirements.

II. The Plaintiff's Action Arises Under the Laws of the United States

The incorporation of the law of nations into federal common law is well established. (*See The Paquete Habana*, 175 U.S. 677 (1900).) The unprovoked attacks allegedly by the Argentine armed forces on S/T Hercules constitute a violation of the law of nations. The English Prize Courts have also historically administered the "law of the nations." (*See, e.g., The Maria* (No. 1) (1799) 1 C. Rob. 340, in which Lord Stowell identified his duty on the bench "to administer . . . that justice which the law of nations holds out without distinction to independent states. . . .")

No legislative history of the Alien Tort Act survives on the congressional intent in enacting this statute regarding the effect of the Act on sovereign immunity. Pertinent in this context is the language from *Siderman* in the central district court of California, which recently said: "Although it could be argued that 28 U.S.C. §1350 provides an exception to foreign sovereign immunity, said statute in its grant of subject matter jurisdiction is silent as to its intended effect on foreign sovereign immunity. Whether this silence should be interpreted as impliedly effecting an exception to foreign sovereign immunity requires an examination of the state of the immunity law at the time of enactment." (*See Siderman v. The Republic of Argentina*, C.D. Cal., No. CV 82-1772-RMT (MCx), March 7, 1985.)

Regarding the state of the immunity law at the time of enactment of the Alien Tort Act, this much is certain that in prize cases during the 17th and 18th centuries the captor's sovereign had no defense of sovereign immunity. I would suggest that by analogy, no one else could either, for the prize courts applied international law and under the law of nations the neutral shipowner who suffered loss or damage by the act of a sovereign on the high seas had a right of compensation. (*See, e.g., The Felicity* (1819) 2 Dods. 381.)

III. The Law of the Sea Convention and Customary International Law

It is also worth noting that provisions in article 110 para. 2 and article 111 para. 8 of the 1982 Law of the Sea Convention (*See The Official Text*, U.N. Pub. Sales No. E. 83. V. 5 (1983)), which are almost identical to the provisions of article 22 para. 3 and article 23 para. 7 respectively of the 1958 Geneva Convention on the High Seas (*See U.N. Doc. A/CONF. 13/L.53*)), specify the shipowner's right to compensation "for any loss or damage that may have been sustained" by certain acts of a warship or the ship of a coastal state pursuant to the right of visit and the right of hot pursuit respectively. The former applies in cases such as piracy and slave trade and the latter when the foreign ship has allegedly violated a coastal state's laws and regulations.

The articles in these conventions mentioned above simply codify what has become a principle of customary international law, that a neutral shipowner who has suffered loss or damage by the act of a sovereign on the high seas has a right to compensation and restitution. These conventions do not specify the forum in which a shipowner's claims for compensation are to be adjudicated. It could be added that since the prize courts, established by a sovereign, provided the proper forum during the era of the prize cases, by analogy, Argentina would be an appropriate forum for adjudication of this action. However, if the Argentine forum were not available to the plaintiff, the alleged action being a violation of customary international law, coupled with the Alien Tort Act's provisions specifying jurisdiction in a U.S. district court, this action's adjudication in a U.S. district court is proper. The applicable law will be the law of nations.

/s/ VED P. NANDA
VED P. NANDA

Signed and entered on October 9, 1985.

SUBSCRIBED AND SWORN TO before me,
the undersigned

Notary Public, on this 9th
day of October, 1985.

/s/ LORA L. COVEN
Notary Public
7039 E. 18th Avenue, Suite 212
Denver, Co 80220

My Commission Expires:
May 10, 1987

EXHIBIT 23--COMMISSION AS JUDGE OF THE
ADMIRALTY IN MARYLAND,
DATED NOVEMBER 27, 1775

NAVAL DOCUMENTS OF
THE AMERICAN REVOLUTION

VOLUME 2

American Theatre: Sept. 3, 1775 - Oct. 31, 1775
European Theatre: Aug. 11, 1775 - Oct. 31, 1775
American Theatre: Nov. 1, 1775 - Dec. 7, 1775

William Bell Clark, Editor
*For and in Collaboration with
The U.S. Navy Department*

With a Foreword by
President Lyndon B. Johnson
And an Introduction by
Rear Admiral Ernest McNeill Eller, U.S.N. (Ret.)
Director of Naval History

WASHINGTON: 1966

COMMISSION AS JUDGE OF THE ADMIRALTY IN
MARYLAND¹

Maryland ss Robert Eden Esquire Lieutenant General and
Chief Govenor in and over the Province of
Maryland and Admiral thereof

To Robert Smith Esqr of the City of Annapolis

Greeting Out of the especial Trust and Confidence I
have in your Fidelity Integrity Circumspection and Kno-
ledge I do hereby Authorize and impower you to Take
Cognizance of and Proceed To hear and determine all
causes Civil and [November 1775 1165] Maritime and All
Plaints Contracts Offences or Crimes so Accounted Pleas
Debts Exchanges, Assurances, Accounts, Charter Parties,
Agreements and Writings concerning the lading of Ships
and Vessels and in all other Business and contracts which
Concern Mariners for their Ships Convoys and Freight or
Mariners Wages or in any wise thereto relating also Suits
Trespasses Injuries Extortions and demands and all civil
and Maritime Matters whatsoever between Merchants or
between Masters and Owners of Ships or other Vessels
and Merchants or other Persons whatsoever with the said
Masters or Owners of Ships and of all other Vessels what-
soever Occupied or used or betwen any other Persons
whatsoever had made commenced or contracted for any
Thing Matter or cause or Business whatsoever as well in
or upon or Through the Sea the Publick Stream[s] Ports
fresh Waters Rivers Creeks or Places overflowed with
Water whatsoever within the Flux and reflux of the sea
and Water To high water Mark as upon the Shores or
Banks whatsoever to them or any of them adjacent ex-
pedited or to be expedited together with all and Singuler
their Incidents Emergencies and causes whatsoever
anne[xed] And connexed or in what Manner soever the

¹ Court of Vice-Admiralty Records, Md. Arch.

causes Plaints and Other the Premises aforesaid or any
of them may happen by Order To be transacted drawn or
made according to the civil and Maritime Law of the high
Court of Admiralty of great Britain within This Province
and the Territories to the same belonging and also in any
of The City's Towns or Places in the aforesaid Province
for the like Causes And Matters to sit hear and Determine
therein according to Justice and Judicially and Lawfully
to proceed together with all and singular their Incidents
Emergencies Dependances and Causes a[nne]xed or con-
nexed whatsoever And furthermore to compell Witnesses
(if for good Will) hatred favoured fear or for any other
Causes whatsoever they shall withdraw themselves To give
their Testimony to the Truth in all or any of the like
Causes according As right requireth and furthermore to
take all recognizances Obligations Surities and Stipulations
as well on the Part or instance of any Person Whatsoever
for any contracts Debts or other Matters causes or Busi-
ness Whatsoever and them put in Execution and cause or
command them to be executed and also Duly to enquire
of and take into your Custody all and singular the Goods
of Traytors Pyrates Manslayers Felons Fugitives and Fel-
o's dese and of all Bodies and Persons drowned slain or
any wise coming to their Death in the Sea Ports Rivers
Publick Streams or Creeks And Places whatsoever over-
flown and of Maihm happening in Any of the Places afore-
said and of all unlawful and forbiddin Engines and Netts
and of the Occupiers and users thereof and of all Royal
Fish [V]izt Whales Sharks Grampusses Dolphins Sturgeons
and all other great large Fish whatsoever to the right
Honorable The Lord Proprietary of this Province belonging
in right of his Admiralty thereof and also of and upon all
goods lost on the Sea Wrecks Flotsons Jetsons Lagons
Shoars cast upon the Sea and Wrecks of the Sea and
Goods had or accounted to be forfeited or by any Chance
or Fortune Found or to be found and of all Trespasses
Faults Offences Enormities and Crimes Maritime whatso-

ever as well upon the High Sea as in or upon all And any the Ports Rivers Fresh Waters and Creeks or Sea Shores and to the height of the Water from any the first Bridge towards the sea in and Through this Province howsoever belonging [1166 American Theatre] to the Maritime Coasts thereof Whensoever and howsoever coming and happening committed and done or to be Perpetrated and committed discovered and found and to Tax moderate exact Collect and Levy all Fine Mulcts Amerciaments and compositions whatsoever in the Part Due or to be Due and them lawfully to Command and Expect to be collected and Paid and also to Proceed in all and Singular the Matters aforesaid and in all other Causes Contempts and Offences whatsoever and howsoever contracted or if so be the goods or Persons of the Offenders shall be found within the Jurisdiction of the Court of Admiralty within this Province according to the Laws Civil and Maritime and Customs of old used in his Majesty's high [co]urt of Admiralty of great Britain and by such other Lawfull Ways Manners and Means as you may better know and can Proceed And such Causes and Contracts to hear examine Discuss and finally Determine saving nevertheless the right of Appealing and also to arrest command and cause to be arrested the Ships Persons Effects goods Wares and Merchandizes whatsoever for the Premisses and for any of them or other causes whatsoever concerning them in what Places soever Within the Province of Maryland aforesaid the Territories thereof they shall happen to be or be found in or without the Liberties and to Compel All Persons whatsoever in that Part as the Case shall require to Appear and answer with the Power of inflicting any Punishment or Muilt according to the Laws and Customs aforesaid and to do And Cause Justice to be done therein and also Summarily and Plainly to Proceed the order of right being Preserved or the Sail [illegible] up without Noise and the Figure of Judgement alone being made and the Truth of the thing inspected AND I DO further commit And by the Tenor of these

Presents grant you full Power and Authority to fine correct punish and Chastize and reform all guilty Persons Imprisoned and all Violaters and Usurpers of the rights of the Court of Admiralty within this Province and all Delinquents And Contumaciously absenting Sailors Mariners Fishermen Boatmen and other Workmen having skill or exercising Maritime Affairs Ordinances and customs aforesaid and their De[sser]ts as also according to the Statutes and ordinances of the kingdom of great Britain In that Part Published and Provided and them to imprison And cause to be imprisoned in any of the Prisons within the Province of Maryland or the Maritime Places thereto belonging and such Persons so imprisoned who ought to be Delivered therefrom To command and cause to be Delivered and altogether to be Acquitted and Discharged and do hereby grant unto you Power and Authority of Promulgating or interposing all Decrees and Sentences whatsoever and them to command to be executed together with the cognizance and Jurisdiction of all other Causes civil And Maritime commenced or to be commenced or which any Ways concern or relate to the Sea Affairs or the Transporting or Passage over the Sea or any Naval Journey or Maritime Voyge or Maritime Jurisdiction Aforesaid also with Power of Proceeding therein according to the civil and Maritime Laws and Customs Aforesaid of the high Court of Admiralty of great Britain of old used as well of more Office mixt or Promoted as at the Instance of any Party as the Case shall require and it shall seem expedient And to grant you full authority to execute all and singular the Premisses in the Places aforesaid expressed and I do hereby Appoint you the [November 1775 1167] Said Robert Smith my Commissary in the said Province and Territories aforesaid during Pleasure hereby Granting upon you the said Robert Smith all Fees Profits and Advantages to the said Office any ways belonging and I do hereby command all Justices of the Peace Mayors Sheriffs Keepers of Goals and other Officers and Ministers

within this Province to be aiding and Assisting to you as Becometh as they will answer the contrary at their Peril—

Given at the City of Annopolis this twenty seventh Day of Novemb'r in the fifth Year of the Dominion of The right Honorable Henry Harford Esquire Anno Domine 1775

Signed by order James Brooks

**EXHIBIT 40—LETTER FROM CONGRESSMAN YOUNG
TO PRESIDENT REAGAN DATED JUNE 16, 1982**

**Congress of the United States
House of Representatives
Washington, D.C. 20515**

June 16, 1982

President Ronald Reagan
The White House
Washington, D.C.

Dear Mr. President:

Enclosed for your use and information is a press report on the attack and bombing of 220,000 ton crude oil tanker engaged in the trade of moving Alaska crude oil from Valdez, Alaska around South America's Cape Horn to a refinery in St. Croix, Virgin Islands. While the news reports are very sketchy, this attack on a tanker moving Alaska crude oil to a U.S. Territory for refining and eventual use on the East Coast of the United States raises very serious questions about security of supply and U.S. policies governing the movement of Alaska crude oil.

This attack, coupled with recent events in Central America and in the Middle East, underscores once again the vulnerability of this nation to serious disruption in domestic and imported crude oil supplies and shipments. Our extreme vulnerability to instability in the Middle East has been widely acknowledged since 1973. Subsequent events, for example, in Israel, Lebanon, Syria, Iran, Bahrain, and between Iran and Iraq, indicates the continued uncertainty of the free world's oil security.

As you know, we are also dependent on the Panama Canal for the transshipment to Gulf Coast refineries of some 750,000 barrels of crude oil produced in Alaska and California. At present there is no secure west-to-east pipe-

line transportation system to transport this oil, should the Canal (or the pipeline across the Isthmus of Panama scheduled to be completed later this year) be disabled. This adds additional uncertainty to our nation's oil supply outlook.

Secretary of State Haig a few weeks ago said that in Central America, "We are, in effect, at the very core of United States hemispheric interests," involving "the strategic vulnerability of the Canal and our fundamental dependence on its being retained in friendly hands." Assistant Secretary of State Enders stated recently that the "decisive battle for Central America is under way in El Salvador. If after Nicaragua, El Salvador is captured by a violent minority, who in Central America would not live in fear?" he asked. Assistant Secretary Enders went on to ask, "*How long would it be before major strategic United States interests—the Panama Canal, sea lanes, oil supplies—were at risk?*" (Emphasis added.) To suggest that the Panama Canal can be an inviting target for terrorists is to state the obvious. To learn now that a ship engaged in hauling Alaska oil has been attacked en route via Cape Horn emphasizes the risks we face.

I am deeply concerned that a combination of the continued upheaval in oil producing areas and the vulnerability of the ocean transportation systems as the attack on the tanker Hercules demonstrates, continued to pose a severe threat to our national security. I am accordingly asking you, the Department of Defense and other appropriate agencies for an assessment of this potentially dangerous situation.

Construction on the Northern Tier Pipeline, a major west-to-east crude oil pipeline authorized by Congress under Title V of the Public Utilities Regulatory Policies Act of 1978 (PURPA), would eliminate any potential crude oil supply disruption caused by armed aggression in South America or a blockage of the Panama Canal. When the previous Administration approved the Northern Tier Pipe-

line pursuant to procedures outlined in PURPA, it identified national security interests as a major factor in its decision. Located entirely within the United States, the pipeline would provide a totally secure transportation mechanism to move vital oil supplies to the nation's agricultural and industrial heartland. However, construction of this oil transportation system is currently blocked by the failure of a single state—Washington—to grant the final necessary permit. At present this matter is in litigation.

I would appreciate it if you would have the Secretaries of Defense and State prepare a report on the following matters:

1. The attack on the tanker Hercules;
2. The threat posed to other tankers in the Alaska crude oil trade and other shipping using Cape Horn; and
3. Current U.S. policy toward construction of an all American secure west-to-east crude oil pipeline for moving Alaska crude to market.

I would appreciate progress reports on this matter.

Sincerely,

/s/ DON YOUNG

DON YOUNG

Congressman for All Alaska

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**EXHIBIT 33—HAND-WRITTEN NOTES OF SENATE
DRAFT OF THE JUDICIARY ACT OF 1789**

(For convenience of the Court and of Counsel this exhibit
is bound in on the opposite pages.)

And be it further enacted, That the district courts shall have, exclusively of the courts of the ~~several~~ ^{several} States, cognizance of all crimes & offenses that shall be committed under the authority of the United States by the laws of the same, committed within the district where the same shall be committed, where the punishment is death, or imprisonment for a term exceeding ^{one} year, or a higher fine than ^{one} hundred dollars, or a longer term of imprisonment than six months, is not to be inflicted, except where the laws of the United States shall otherwise direct, & the trial of facts shall be by jury. — And shall also have exclusive original cognizance of all civil causes of admiralty & maritime jurisdiction, except of crimes ~~where the sentence is death~~ ^{where the sentence is death} including all seizures under laws of import, navigation or trade of the United States, ^{which are} while the seizure shall be made on waters navigable from the sea. As ⁱⁿ ~~with~~ ^{the} ^{provisions} of ^{the} ^{act} of 1800. ^{one} ^{of} ^{the} ^{provisions} ^{of} ^{the} ^{act} ^{of} ¹⁸⁰⁰ directing ^{the} ^{district} ^{courts} ^{to} ^{be} ^{established} ⁱⁿ ^{each} ^{of} ^{the} ^{United} ^{States} ^{and} ^{to} ^{be} ^{vested} ^{with} ^{the} ^{jurisdiction} ^{of} ^{all} ^{cases} ^{of} ^{the} ^{nature} ^{and} ^{kind} ^{of} ^{the} ^{cases} ^{which} ^{are} ^{now} ^{vested} ⁱⁿ ^{the} ^{district} ^{courts} ^{and} ^{to} ^{be} ^{vested} ^{with} ^{the} ^{jurisdiction} ^{of} ^{all} ^{cases} ^{of} ^{the} ^{nature} ^{and} ^{kind} ^{of} ^{the} ^{cases} ^{which} ^{are} ^{now} ^{vested} ⁱⁿ ^{the} ^{district} ^{courts} ^{and} ^{to} ^{be} ^{vested} ^{with} ^{the} ^{jurisdiction} ^{of} ^{all} ^{cases} ^{of} ^{the} ^{nature} ^{and} ^{kind} ^{of} ^{the} ^{cases} ^{which} ^{are} ^{now} ^{vested} ⁱⁿ ^{the} ^{district} ^{courts} ^{and} ^{to} ^{be} ^{vested} ^{with} ^{the} ^{jurisdiction} ^{of} ^{all} ^{cases} ^{of} ^{the} ^{nature} ^{and} ^{kind} ^{of} ^{the} ^{cases} ^{which} ^{are} ^{now} ^{vested} ⁱⁿ ^{the} ^{district} ^{courts} ^{and} ^{to} ^{be} ^{vested} ^{with} ^{the} ^{jurisdiction} ^{of} ^{all} ^{cases} ^{of} ^{the} ^{nature} ^{and} ^{kind} ^{of} ^{the} ^{cases} ^{which} ^{are} ^{now} ^{vested} ⁱⁿ ^{the} ^{district} ^{courts} ^{and} ^{to} ^{be} ^{vested} ^{with} ^{the} ^{jurisdiction} ^{of} ^{all} ^{cases} ^{of} ^{the} ^{nature} ^{and} ^{kind} ^{of} ^{the} ^{cases} ^{which} ^{are} ^{now} ^{vested} ⁱⁿ ^{the} ^{district} ^{courts} ^{and} ^{to} ^{be} ^{vested} ^{with} ^{the} ^{jurisdiction} ^{of} ^{all} ^{cases} ^{of} ^{the} ^{nature} ^{and} ^{kind} ^{of} ^{the} ^{cases} ^{which} ^{are} ^{now} ^{vested} ⁱⁿ ^{the} ^{district} ^{courts} ^{and} ^{to} ^{be} ^{vested} ^{with} ^{the} ^{jurisdiction} ^{of} ^{all} ^{cases} ^{of} ^{the} ^{nature} ^{and} ^{kind} ^{of} ^{the} ^{cases} ^{which} ^{are} ^{now} ^{vested} ⁱⁿ ^{the} ^{district} ^{courts} ^{and} ^{to} ^{be} ^{vested} ^{with} ^{the} ^{jurisdiction} ^{of} ^{all} ^{cases} ^{of} ^{the} ^{nature} ^{and} ^{kind} ^{of} ^{the} ^{cases} ^{which} ^{are} ^{now} ^{vested} ⁱⁿ ^{the} ^{district} ^{courts} ^{and} ^{to} ^{be} ^{vested} ^{with} ^{the} ^{jurisdiction} ^{of} ^{all} ^{cases} ^{of} ^{the} ^{nature} ^{and} ^{kind} ^{of} ^{the} ^{cases} ^{which} ^{are} ^{now} ^{vested} ⁱⁿ ^{the} ^{district} ^{courts} ^{and} ^{to} ^{be} ^{vested} ^{with} ^{the} ^{jurisdiction} ^{of} ^{all} ^{cases} ^{of} ^{the} ^{nature} ^{and} ^{kind} ^{of} ^{the} ^{cases} ^{which} ^{are} ^{now} ^{vested} ⁱⁿ ^{the} ^{district} ^{courts} ^{and} ^{to} ^{be} ^{vested} ^{with} ^{the} ^{jurisdiction} ^{of} ^{all} ^{cases} ^{of} ^{the} ^{nature} ^{and} ^{kind} ^{of} ^{the} ^{cases} ^{which} ^{are} ^{now} ^{vested} ⁱⁿ ^{the} ^{district} ^{courts} ^{and} ^{to} ^{be} ^{vested} ^{with} ^{the} ^{jurisdiction} ^{of} ^{all} ^{cases} ^{of} ^{the} ^{nature} ^{and} ^{kind} ^{of} ^{the} ^{cases} ^{which} ^{are} ^{now} ^{vested} ⁱⁿ ^{the} ^{district} ^{courts} ^{and} ^{to} ^{be} ^{vested} ^{with} ^{the} ^{jurisdiction} ^{of} ^{all} ^{cases} ^{of} ^{the} ^{nature} ^{and} ^{kind} ^{of} ^{the} ^{cases} ^{which} ^{are} ^{now} ^{vested} ⁱⁿ ^{the} ^{district} ^{courts} ^{and} ^{to} ^{be} ^{vested} ^{with} ^{the} ^{jurisdiction} ^{of} ^{all} ^{cases} ^{of} ^{the} ^{nature} ^{and} ^{kind} ^{of} ^{the} ^{cases} ^{which} ^{are} ^{now} ^{vested} ⁱⁿ ^{the} ^{district} ^{courts} ^{and} ^{to} ^{be} ^{vested} ^{with} ^{the} ^{jurisdiction} ^{of} ^{all} ^{cases} ^{of} ^{the} ^{nature} ^{and} ^{kind} ^{of} ^{the} ^{cases} ^{which} ^{are} ^{now} ^{vested} ⁱⁿ ^{the} ^{district} ^{courts} ^{and} ^{to} ^{be} ^{vested} ^{with} ^{the} ^{jurisdiction} ^{of} ^{all} ^{cases} ^{of} ^{the} ^{nature} ^{and} ^{kind} ^{of} ^{the} ^{cases} ^{which} ^{are} ^{now} ^{vested} ⁱⁿ ^{the} ^{district} ^{courts} ^{and} ^{to} ^{be} ^{vested} ^{with} ^{the} ^{jurisdiction} ^{of} ^{all} ^{cases} ^{of} ^{the} ^{nature} ^{and} ^{kind} ^{of} ^{the} ^{cases} ^{which} ^{are} ^{now} ^{vested} ⁱⁿ ^{the} ^{district} ^{courts} ^{and} ^{to} ^{be} ^{vested} ^{with} ^{the} ^{jurisdiction} ^{of} ^{all} ^{cases} ^{of} ^{the} ^{nature} ^{and} ^{kind} ^{of} ^{the} ^{cases} ^{which} ^{are} ^{now} ^{vested} ⁱⁿ ^{the} ^{district} ^{courts} ^{and} ^{to} ^{be} ^{vested} ^{with} ^{the} ^{jurisdiction} ^{of} ^{all} ^{cases} ^{of} ^{the} ^{nature} ^{and} ^{kind} ^{of}

for a tort only in violation of the law of
nation or a treaty of the United States. — And
shall also have cognizance, concurrent as last
mentioned, of all ~~civil suits~~ ^{common law} where
the United States or a common informer as well
for himself as the United ^{States} sue, ~~of the matter~~
in dispute amounts, exclusive of ~~costs~~, to the
sum or value of ¹⁰⁰ dollars. And the trial
of facts in both cases last mentioned shall be
by jury.

~~And be it further enacted, that the~~
circuit courts shall have original cognizance
concurrent with the courts of the several States,
the supreme court, as the case may be, of all
suits, ^{of a civil nature} at common law or in equity, where the
matter in dispute exceeds, exclusive of costs,
the sum or value of ⁵⁰ dollars & the United
States are plaintiffs or petitioners; ~~and where the~~
~~petitioner is a citizen of the United States~~

— ~~or is~~ ^{or is} a foreigner or citizen of another
State than that in which the matter is brought, but as agents
— and shall have concurrent jurisdiction
of all crimes & offenses cognizable under
the authority of the United States, & defined by the
laws of the same, ^{this act otherwise provides} except where the laws of the
United States shall otherwise direct, & concurrent
jurisdiction with the district courts of the crimes

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2 offences cognizable therein. But no person shall be ^{brought to trial} ~~tried~~ in any civil ~~case~~ ^{action} before any other circuit ~~court~~ ^{or} district court ~~in~~ ^{from} ~~the~~ ^{the} district where the ~~case~~ ^{action} is ~~tried~~ ^{heard}. And the circuit court ~~may~~ ^{shall} also have appellate ~~jurisdiction~~ ^{jurisdiction} from the district courts under the regulations & restrictions hereinafter provided.

12 And be it further enacted ~~by the circuit court~~ ^{that if a suit be commenced in any state court against a foreigner or citizen of another state than that in which the suit is brought, & the matter in dispute exceeds the aforesaid sum or value of \$100 dollars, exclusive of costs, & such foreigner or citizen shall, at the time of entering his appearance in such state court, file a motion for the removal of the cause for trial into the next circuit court to be held in the district where the suit is pending, and offer good & sufficient surety for his entering in such circuit court, on the first day of its session, copies of said process against him, & also for his there appearing in the cause if special bail was originally requisite therein; it shall then be the duty of the state court} to

~~other district than that whereof it is an inhabitant or in which found at the time of serving and neither of the courts above mentioned make any motion to remove the cause into the next circuit court in favor of or against any party appearing in such court to remove the said cause.~~

17
defendants shall in such case abide by his plea
in law. — And the trial of facts in the circuit courts
shall in all suits, except those of equity & of ad-
ministrative & maritime jurisdiction be by jury.

13 And be it further enacted, ^{the authority}
that the supreme court shall have
exclusive jurisdiction of all controversies of a
civil nature, where any of the United States is a
party or a foreign State is a party, except between
a State & its citizens; & except also between a State
& citizens of other States or foreigners, in which latter
case it shall have original but not exclusive

jurisdiction: — And shall have exclusively all
such jurisdiction of suits or proceedings against
ambassadors, other public ministers or consuls,
or their domesticks or domestick servants, as a
court of law can have or exercise consistently
with the law of nations; And original, but not
exclusive jurisdiction of all suits for trespasses
brought by ambassadors, other public ministers
or consuls, or their domesticks or domestick

servants. — And the trial of facts, ^{the} supreme
court, in all actions at law against citizens
of the United States, shall be by jury. — The
supreme court shall ^{also} have appellate jurisdiction

from

from the circuit courts & courts of the several states in the cases herein after specially provided for. - And shall have power to issue writs of prohibition to the inferior courts when

necessary by writs of ad habeas corpus, and writs of mandamus, in cases warranted by the principles & usages of law, to any courts appointed, or persons holding office under the authority of the United States.

14 And he it further enacted ~~by the authority~~ ^{that} all the before mentioned Courts of the United States shall have power to issue writs of Scire-facias, subpoena & protection for writs of Habeas Corpus, & all other writs not specially provided for by Statute, which may be necessary for the exercise of their respective jurisdiction, & agreeable to the principles & usages of law.

- And that either of the Justices of the Supreme Court, as well as Judges of the district courts, shall have power to grant writs of habeas corpus for the purpose of an enquiry into the cause of commitment. - Provided that writs of habeas corpus shall in no case extend to prisoners in gaol unless where they are incarcerated under or by colour of the authority of the

the courts respectively, on motion as aforesaid to give judgment against him ^{or her} by default.

And be it further enacted by the authority aforesaid that suits in equity shall not be sustained in either of the courts of the United States, in any case where remedy may be had at

^{* Marshall deposition admitted in suits of individuals in equity}

And be it further enacted by the authority aforesaid, that all the said courts of the United States shall have power to grant new trials, in cases where there has been a trial by jury, for reasons ~~for~~ which ~~may~~ ^{shall} have usually been granted in the courts of law. - And shall have power to impose & administer all necessary oaths, & to punish

by fine or imprisonment, at the discretion of said courts, all contempt of authority in any cause or hearing before ~~the~~ ^{the same} & to make & establish all

the order and proceedings in the said courts, provided such laws are not repugnant to the laws of the United States.

And be it further enacted by the authority aforesaid

* in cases of admiralty & maritime jurisdiction

in the said courts of the United States

in common law & equity

giving testimony in suits in equity & in common law

admiralty & maritime jurisdiction shall be the same as in suits at common law, or as is herein after specially provided

as in suits at common law, or as is herein after specially provided

of facts shall be by him. — And shall also
have exclusive cognizance of all
civil causes of admiralty & maritime jurisdiction,
except of crimes where the ~~decrees~~ ^{are} ~~shall be~~
including all seizures under laws of import, navigation,
or trade of the United States, where the seizures
shall be made on waters navigable from the
sea ^{by} ~~within~~ ^{or upon} the ~~high~~ ^{open} seas.
Having to do with all cases the right of a
common law remedy where the common law
is competent to give it. — And shall also have
cognizance, concurrent with the courts of the
several States or the circuit courts, as the case
may be, of all cases where a foreigner

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for a tort only in violation of the law of
nations or a treaty of the United States. — And
shall also have cognizance, concurrent as last
mentioned, of all ~~seal~~ ^{seal} suits of common law where
the United States, or a common informer as well
for himself as the United States, sue, ⁱⁿ the matter

(6)
No. 87-1372

Supreme Court, U.S.

FILED

JUN 30 1988

JOSEPH E. SPANIOLO, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ARGENTINE REPUBLIC,

Petitioner,

v

AMERADA HESS SHIPPING CORPORATION AND UNITED
CARRIERS, INC.,

Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Second Circuit

BRIEF FOR THE PETITIONER

BRUNO A. RISTAU

Counsel of Record

JOEL E. LEISING

KAPLAN RUSSIN & VECCHI

1215 Seventeenth St., N.W.

Washington, D.C. 20036

(202) 887-0353

Attorneys for the Petitioner

QUESTIONS PRESENTED

1. Whether a court of the United States is competent under international law to entertain a suit against a foreign state for conduct that took place wholly outside the territory of the United States.

2. Whether the Foreign Sovereign Immunities Act of 1976 (FSIA) is the exclusive jurisdictional basis for suits against foreign states in the courts of the United States, or whether a suit against a foreign state may also be heard under the Alien Tort Statute of 1789 which empowers district courts to hear "any civil action by an alien for tort only, committed in violation of the law of nations."

3. Whether a court of the United States has personal jurisdiction to hear a claim by an alien against a foreign state for a tort alleged to have been committed by its armed forces on the high seas in violation of international law.

The caption of the case in this Court contains the names of all parties.

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IN THE
Supreme Court of the United States
 OCTOBER TERM, 1987

No. 87-1372

ARGENTINE REPUBLIC,
Petitioner,
 v.
 AMERADA HESS SHIPPING CORPORATION
 and UNITED CARRIERS, INC.,
Respondents.

On Writ of Certiorari to the United States
 Court of Appeals for the Second Circuit

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet.App. 1a-21a) is reported at 830 F.2d 421 (1987). The opinion of the United States District Court for the Southern District of New York (Pet.App. 25a-35a) is reported at 638 F.Supp. 73 (1986).

JURISDICTION

The judgment of the court of appeals was entered September 11, 1987 (Pet.App. 22a). The petitioner's timely petition for rehearing and suggestion for rehearing en banc were denied on November 18, 1987 (Pet.App. 24a). The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

1. The Fifth Amendment to the Constitution of the United States of America provides in pertinent part:

No person shall be . . . deprived of . . . liberty, or property, without due process of law; . . .

2. The Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. §§ 1330, 1332 (a)(2)-(4), 1391(f), 1441(d), 1602-1611 (1982), reads in relevant part as follows:

§ 1330. Actions against foreign states

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has not been made under section 1608 of this title.

• • • • •

§ 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

§ 1605. General exceptions to the jurisdictional immunity of a foreign state.

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

• • • • •

(5) not otherwise encompassed in paragraphs (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

3. The Alien Tort Statute of 1789, 28 U.S.C. § 1350, (1982) reads as follows:

§ 1350. Alien's action for tort

The district courts shall have original jurisdiction of any civil action by an alien for a tort only committed in violation of the law of nations or a treaty of the United States.

STATEMENT OF THE CASE

A. THE ALLEGATIONS OF THE COMPLAINTS

Respondents United Carriers, Inc. ("United Carriers") and Amerada Hess Shipping Corporation ("Amerada Hess"), two Liberian corporations (J.A. 19, 28), sued the petitioner in the district court for an alleged tort committed in violation of the law of nations on the high seas. Respondents' claimed that during the Falkland Islands/Malvinas armed conflict between Argentina and the United Kingdom in 1982, Argentine military aircraft attacked and caused the loss in the South Atlantic of a vessel owned and chartered, respectively, by the respondents (J.A. 23, 25, 29-30).

United Carriers' complaint alleged that it was the owner of the Liberian-registry tanker, the HERCULES (J.A. 28); that the vessel was engaged in carrying crude oil from Alaska, via the Cape Horn, to a refinery in the Virgin Islands (J.A. 28-29); that on June 8, 1982, while on a return voyage under ballast from the Virgin Islands to Alaska, the HERCULES was attacked and bombed in the South Atlantic by aircraft of the Argentine armed forces (J.A. 29); that as a result of these attacks the vessel suffered damages and was diverted to the port of Rio de Janeiro where it was determined that an undetonated bomb was lodged in one of the vessel's tanks (J.A. 29-30); that some six weeks later United Carriers decided to sink the vessel to avoid the risks inherent in an attempt to remove the undetonated bomb (J.A. 30); and that the vessel was scuttled in the Atlantic on July 20, 1982, some 250 miles off the coast of Brazil (*ibid.*). United Carriers claimed damages for the loss of the vessel in the amount of \$10 million (*ibid.*) It sought to vest jurisdiction in the district court exclusively under the Alien Tort Statute, 28 U.S.C. § 1350 (J.A. 28).

The factual allegations in Amerada Hess' complaint concerning the loss of the HERCULES paralleled those in

United Carriers' complaint (J.A. 19-27). Amerada Hess asserted that it had time-chartered the HERCULES from United Carriers (J.A. 20) and that at the time the HERCULES was scuttled it carried bunkers owned by Amerada Hess valued at some \$1.9 million, for which amount it claimed damages (J.A. 25, 26). Amerada Hess sought to vest jurisdiction in the district court on three separate bases: the Alien Tort Statute, general admiralty and maritime jurisdiction, and universal jurisdiction for violations of international law.¹ (J.A. 19-20).

B. THE RULINGS OF THE COURTS BELOW

Petitioner moved to dismiss both suits under Rule 12(b), F.R.Civ.P., for lack of subject matter and personal jurisdiction (J.A. 31, 33), and the district court dismissed the suits for lack of subject matter jurisdiction (Pet.App. 25a-35a). As with any motion to dismiss, the district court accepted the well-pleaded factual allegations of the complaints as true. In filing its jurisdictional challenges, petitioner did not, of course, concede the truth of the facts as alleged in the complaints.

The district court held that the FSIA was the exclusive source of jurisdiction in suits against foreign states. Pointing to § 1604 of the FSIA, the district court ruled that "[a] foreign state is subject to jurisdiction in the courts of this nation if, and only if, an FSIA exception empowers the court to hear the case," (Pet.App. 29a). The court found that none of the statutory exceptions to sovereign immunity from suit applied (Pet.App. 30a), and that the petitioner was therefore immune from suit under the ex-

¹ In their statutory notices of suit, both respondents expressly disclaimed reliance on the FSIA as a jurisdictional predicate for their suits (Pet. App. 28a, 31a), although they caused service of their complaints to be made on the petitioner in conformity with the service provisions of 1608(a)(3) of the FSIA, viz., by mailing the summonses, complaints and the statutory notices of suit to petitioner's Minister of Foreign Affairs in Argentina (*ibid.*).

press provisions of that Act. The district court did not separately address the question of personal jurisdiction.

The court considered at length, and rejected, respondents' contention that the Alien Tort Statute provided an independent source of jurisdiction for suits against foreign states when the aggrieved party is an alien (Pet.App. 31a-35a). It further rejected respondents' argument that Congress, in passing the FSIA, intended to preserve those provisions of the First Judiciary Act, which, according to respondents, were intended to permit aliens to assert claims against foreign sovereigns for violations of international law. The district court concluded (Pet.App. 31a):

Both the premises and the conclusion of this inventive argument must be rejected. First, we do not credit plaintiff's contention that the Argentine Republic would not have enjoyed foreign sovereign immunity in an action such as this in 1789. Second, even if we accept plaintiff's version of legal history, the language of the Alien Tort Act is silent as to foreign sovereign immunity. Therefore, the FSIA does not repeal the Alien Tort Act any more than it repeals any other jurisdictional act that by its terms may include actions brought against foreign sovereigns.

The district court also rejected Amerada Hess' alternative contention that the district court should hear its civil claim against petitioner based on the "principle of universal jurisdiction," holding that doctrine only provides for criminal jurisdiction (Pet.App. 35a).

On appeal, a divided panel of the court of appeals reversed (Pet.App. 1a-17a). The majority (Feinberg, C.J., and Oakes, J.) held that the FSIA did not preempt the jurisdictional grant of the Alien Tort Statute and that the district court was competent to hear respondents' claims under that Act (Pet.App. 10a). In the majority's view, it

was irrelevant that a court faced with the circumstances of this case when the First Judiciary Act was enacted in 1789 would not have exercised jurisdiction over a foreign sovereign (Pet.App. 8a). Since in the majority's view the Alien Tort Statute contained a jurisdictional grant based on the "evolving standards of international law" (Pet.App. 9a), and since "attacking a neutral ship in international waters, without proper cause for suspicion or investigation, violates international law" under existing international standards (Pet.App. 7a), respondents could invoke the jurisdiction of a United States court under that Statute to obtain redress against the offending foreign state.

Turning to the jurisdictional provisions codified in the FSIA for suits against foreign states, the majority acknowledged that its Circuit had earlier ruled that "the [FSIA] insulates foreign states from the exercise of federal jurisdiction, except under the conditions specified in the Act," *O'Connell Machinery Co. v. M.V. "Americana"*, 734 F.2d 115, *cert.denied*, 496 U.S. 1086 (1984), and that this Court had "expressed similar views" in *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983) (Pet.App. 11a). Stating that "the view of the FSIA as the sole basis for United States jurisdiction over foreign sovereigns can be traced to the statute's legislative history" (*ibid.*), the majority undertook what it called "a close examination" of the legislative history of the FSIA and concluded that in enacting the FSIA "Congress did not intend to remove existing remedies in United States courts for violations of international law of the kind presented here" (*ibid.*). In the majority's view, the focus of the FSIA was principally on "commercial concerns" (Pet.App. 12a), and international law violations outside the commercial context—such as confiscations—"were not the focus of the 'comprehensive' language of the drafters of the FSIA any more than they were the focus of the Supreme Court in the *Verlinden* case" (*ibid.*). The majority concluded that—

Thus, although Congress did not focus on suits for violations of international law, it clearly expected courts to apply the international law of sovereign immunity. As we have seen, under international law, Argentina would not be granted sovereign immunity in this case. Therefore, a grant of immunity here would fly in the face of this central premise. Since Congress did not express a clear intent to contradict the immunity rules of international law, and, indeed, left the Alien Tort Statute in force, we conclude that the FSIA does not preempt the jurisdictional grant of the Alien Tort Statute.

(Pet.App. 13a).

The majority then addressed the question of personal jurisdiction over the petitioner, recognizing that "even given the jurisdictional grant of the Alien Tort Statute, the district court must have constitutionally satisfactory personal jurisdiction over the defendant" (Pet.App. 14a). The majority concluded that petitioner's actions, as alleged, had a sufficient nexus with the United States so that the exercise of personal jurisdiction would not offend notions of fair play and substantial justice as mandated by the Due Process Clause. In its view, the following factors were of jurisdictional significance (Pet.App. 14a-15a):

- Argentina was on notice that it might be sued here;
- The United States had notified Argentina that the *HERCULES* would be passing through the South Atlantic on neutral business;
- The vessel was plying the United States domestic trade;
- Argentina was aware of the United States' interest in protecting the freedom of the high seas;

- Argentina has the means to defend a suit in the United States;
- If the United States were to decline jurisdiction, substantive policies of international law would be undermined; and
- Fairness favors the exercise of jurisdiction, since the respondents claimed that they were unable to obtain a remedy in Argentina.

In light of these factors, the majority concluded that there is "no constitutional bar to the district court's exercise of personal jurisdiction over Argentina here" (Pet.App. 15a). In consequence, the court of appeals reversed the dismissals in the district court and remanded the cases for further proceedings (Pet.App. 17a).

In her dissent (Pet.App. 18a-21a), Judge Kearse expressed skepticism at the notion that, in enacting the Alien Tort Statute, the First Congress intended to allow federal subject-matter jurisdiction to ebb and flow with the vicissitudes of "evolving standards of international law," in light of the settled rule that federal court subject-matter jurisdiction is not a matter of common law (Pet.App. 19a).

But in any event, Congress had comprehensively covered the field of foreign sovereign immunity when it enacted the FSIA in 1976. In Judge Kearse's view, the express provisions of the FSIA and its legislative history made it abundantly clear that—

- (1) the FSIA provides the exclusive framework within which the courts of the United States are to resolve a foreign state's claim of sovereign immunity, and (2) within that framework, recognition of such immunity is to be the rule, subject only to such exceptions as are expressly provided in the statute. Since the FSIA does not set forth any exception denying immunity in a case such as the present one, I would affirm the

judgment of the district court dismissing this action.

(Pet.App. 21a).

The court of appeals denied petitioner's petition for rehearing and suggestion for rehearing en banc (Pet.App. 24a). This Court granted petitioner's petition for a writ of certiorari on April 18, 1988.

SUMMARY OF ARGUMENT

I. The gravamen of respondents' complaints is that while petitioner's armed forces were engaged in hostilities in the South Atlantic in the spring of 1982 during the Malvinas/Falkland Islands war, petitioner's warplanes attacked and damaged respondents' vessel, and that the damages ultimately caused the respondents to scuttle the vessel. Respondents claimed, and the court of appeals agreed, that the unprovoked attack on a neutral vessel on the high seas constituted a violation of international law for which a tort action will lie in a United States court.

Under international law generally, a state lacks legislative jurisdiction (or "jurisdiction to prescribe") over conduct outside its territory by persons who are not its nationals and where the conduct causes no effect in the forum state. This principle applies with a *fortiori* force to the activities of military forces of a foreign power. Hence, United States courts are not competent to review the legality of the sovereign or public acts of a foreign state where, as here, such acts took place wholly outside the territory of the United States, have no affiliating link with the United States, and draw into issue the military activities of a foreign state.

II. A. The court of appeals erred in seeking to assert jurisdiction over the petitioner under the 1789 Alien Tort Statute, 28 U.S.C. § 1350, for violations of international law claimed to have been committed by petitioner's armed

forces on the high seas. The Foreign Sovereign Immunities Act of 1976 ("FSIA") "govern[s] all actions against foreign sovereigns," *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 491 n. 16 (1983), to the exclusion of any other federal or state law, including the Alien Tort Statute. Section 1604 of the FSIA provides in clear and unambiguous language that a foreign state is immune from the jurisdiction of federal and state courts, subject to a set of exceptions specified in §§ 1605 and 1607 and express jurisdictional provisions in treaties to which the United States is a party.

The FSIA incorporates the so-called "restrictive" doctrine sovereign immunity which permits the maintenance of suits against foreign states for their commercial and private law activities having a nexus with the forum state, but exempts foreign states from the jurisdiction of domestic courts for their public or sovereign activities. The actions of petitioner's armed forces, even if claimed to be in violation of international law, are unquestionably sovereign or public acts for which the petitioner is immune from suit in the courts of the United States under the restrictive doctrine of sovereign immunity.

B. In adopting the restrictive doctrine of sovereign immunity as part of federal law, Congress instructed the courts to interpret and apply the doctrine consistently with international law. The uniform practice of states—as evidenced by recent international codification in Europe, the works of the United Nations' International Law Commission and of the International Law Association, as well as national legislation enacted in the last decade in Australia, Canada, Pakistan, Singapore, South Africa and in the United Kingdom—is to exempt foreign states from the jurisdiction of national courts for acts performed by them in the exercise of public or sovereign powers. The court of appeals plainly erred in its holding that, in enacting the FSIA, Congress did not focus on violations of international law by foreign states and that the FSIA was principally

concerned with the commercial activities of foreign states. The language of § 1604 of the FSIA and its legislative history make it clear beyond peradventure that Congress did not vest United States courts with jurisdiction to sit as international claims courts to adjudicate claims against foreign states for alleged violations of international law.

III. The court of appeals' holding that the Alien Tort Statute provided a jurisdictional basis for suits by aliens against foreign states for alleged violations of international law is without support. To begin with, there is not a glimmer of a hint that that Statute was intended to provide an *in personam* remedy against foreign sovereigns when it was enacted by the First Congress in the late-eighteenth century.

The court of appeals erred in construing the Alien Tort Statute as a standing mandate to the lower federal courts to fashion novel jurisdictional bases for suits against foreign states based on what it deemed to be "evolving standards of international law." Only twelve years ago, in enacting the FSIA, Congress comprehensively regulated the jurisdiction of federal courts in suits against foreign states and incorporated in the Act what it regarded as the current standards of international law on the subject. Congress did not confer upon federal courts authority to fashion their own jurisdictional standards; rather, it made it abundantly clear that the FSIA standards preempted all other federal and state statutes in regard to the suability of foreign states. It is therefore the FSIA standards that the court of appeals should have followed; had it done so, it would have had no choice but to affirm the dismissal of these suits by the district court.

IV. A. There is no basis on which personal jurisdiction could be asserted against the petitioner by a federal court consistently with the Due Process Clause of the Fifth Amendment. In enacting the FSIA, Congress expressly incorporated the due process principles enunciated by this

Court in *International Shoe Company v. Washington*, 326 U.S. 310 (1945), and its progeny. The itemization in the FSIA of non-immune transactions is a prescription of the necessary substantial contacts which foreign states must have with the United States before federal or state courts can exercise personal jurisdiction over them.

Here the record is barren of any affiliating contacts between the petitioner and the United States which would authorize the assertion of personal jurisdiction over it. The alleged tort in violation of international law occurred on the high seas, off the coast of Brazil; the damage was suffered by a Liberian-flag vessel that was, respectively, owned and time-chartered by the respondents, two alien corporations. None of the activities of the petitioner's armed forces which are the subject of the complaint had any connection with the United States, its territory, or its nationals. There is no suggestion that in connection with the activities complained of petitioner purposefully established any contacts, however minimal or tenuous, with the United States.

None of the supposedly affiliating contacts between the petitioner and the United States catalogued by the court of appeals satisfy the due process requirements for personal jurisdiction: that petitioner was notified by the United States that respondents' vessel would be passing through the South Atlantic on neutral business; that the vessel was engaged in the transportation of crude oil from Alaska to the U.S. Virgin Islands; that petitioner was aware of the United States' interest in protecting the freedom of the high seas; that petitioner has ready means to defend the suit here; that substantive policies of international law would be undermined if suit were not maintained in the United States; that the charter party between the respondents called for payment in the United States; and finally, that respondents did not obtain a judicial remedy in the courts of Argentina.

None of these factors, in isolation or jointly, constitutes conduct by the petitioner in, or minimum connection with, the United States which would permit an assertion of personal jurisdiction over the petitioner consistent with the Fifth Amendment's Due Process Clause.

B. Petitioner was also not amenable to service and was therefore not subject to the court's personal jurisdiction on this independent ground. *Omni Capital Int'l v. Rudolf Wolff & Co.*, 484 U.S. —, 98 L.Ed.2d 415, 424 (1987). Although expressly disclaiming that they were invoking the jurisdiction of the district court under the FSIA, respondents served petitioner under the service provisions built into the FSIA. That service provision, however, cannot be carried beyond what Congress intended. Since respondents relied on the Alien Tort Statute as a jurisdictional predicate for their suits, and since that statute has no built-in service provision, respondents could have effected valid service only under the long-arm statute of New York, CPLR § 302. That statute, however, was unavailable for extraterritorial service because of the total lack of contacts between the tort alleged and the state of New York.

ARGUMENT

I. UNITED STATES COURTS LACK COMPETENCE UNDER INTERNATIONAL LAW TO HEAR A CLAIM AGAINST A FOREIGN STATE FOR CONDUCT THAT TOOK PLACE WHOLLY OUTSIDE THE TERRITORY OF THE UNITED STATES

It is petitioner's basic submission that, regardless of the provisions of United States domestic legislation that are drawn into issue in this litigation, United States courts lack competence as a matter of international law to hear the claims asserted by the respondents. Although as shown below, the dispositive United States domestic legislation—the FSIA—is consistent with international custom and

usage in regard to the competence of municipal courts to adjudicate claims against foreign states, petitioner does not wish to be understood as placing sole reliance upon United States domestic law. As an independent sovereign state and a co-equal member of the community of nations with the United States of America, petitioner respectfully draws the Court's attention to the fundamental international law principle that denies competence to municipal courts to review the legality of the public acts of foreign states; this principle applies with a *fortiori* force where such acts take place wholly outside of the territory of the forum state and draw into issue military activities of a foreign state that are unquestionably public or sovereign acts of that state. Cf. *Johnson v. Eisentrager*, 339 U.S. 763, 789 (1950). This Court has from its earliest days recognized and applied as part of the municipal law of the United States established principles of public international law. *The Santissima Trinidad*, 7 Wheat. (20 U.S.) 283 (1822); *The Paquete Habana*, 175 U.S. 677 (1900), and it has repeatedly pronounced that domestic legislation must, wherever possible, be interpreted consistently with international law. *Murray v. The Charming Betsy*, 2 Cranch (6 U.S.) 64, 116 (1804); *Lauritzen v. Larsen*, 345 U.S. 571, 578 (1953).

In petitioner's view, the existence of competence² precedes the question of jurisdictional immunity, since if a court is incompetent to hear a claim, issues of immunity from suit become redundant. Only if a court is competent to hear a claim will it be required (and authorized) to pronounce on the question of immunity. The court of appeals here committed at the very outset the fundamental error in declaring that the district court was competent to hear respondents' claims. Had the court focused on the material factual allegations of the complaint, it would have

² The term "competence" is used in the sense in which this Court employed that term in *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 485 n. 5 (1983).

been compelled to conclude that the district court was right in dismissing the complaints for lack of competence. The gravamen of respondents' complaints here is that while petitioner's armed forces were engaged in hostilities in the South Atlantic in the spring of 1982, its war planes attacked and damaged on the high seas a neutral vessel flying the Liberian flag which was owned and time-chartered by the respondents—two neutral (Liberian) corporations. The damages suffered by the vessel are said to have caused the respondents ultimately to scuttle the vessel in the Atlantic off the Brazilian coast.

Plainly, none of the activities complained of occurred within the territorial jurisdiction of United States courts; they occurred some 5,000 miles off the nearest shores of the United States. The respondents themselves have no links of nationality with the United States. No claim is made that persons or property enjoying the protection of United States laws were harmed.³ The complaints simply seek to invoke the aid of a United States court to constitute itself as an international claims court and to compel the petitioner to justify the actions of its armed forces in this country.

This the courts of the United States are not competent to do. As a matter of international law, the United States has no legislative jurisdiction⁴ to regulate the activities of

³ Indeed, in view of respondents' exclusive reliance on the Alien Tort Statute as a jurisdictional predicate, a claim that United States interests were involved would have been fatal to their jurisdictional thesis under that Statute.

⁴ What the *Restatement (Third) of the Foreign Relations Law of the United States* § 401(a) (1988) ("*Restatement (Third)*") now terms "jurisdiction to prescribe." § 402 of the *Restatement* defines the "Bases of Jurisdiction to Prescribe" as follows:

Subject to § 403, a state has jurisdiction to prescribe law with respect to

(1) (a) conduct that, wholly or in substantial part, takes place within

petitioner's armed forces abroad or on the high seas. Further, also as a matter of international law, the United States has no judicial jurisdiction⁵ to review the lawfulness of petitioner's sovereign public acts abroad.

The court of appeals' jurisdictional ruling here has disregarded these fundamental concepts. No decision of this Court has ever sanctioned such an extraordinary assertion of legislative jurisdiction by the United States, or such a boundless extension of the judicial jurisdiction of United States courts. Moreover, no Act of Congress expressly or by implication authorizes United States courts to review sovereign or public acts of foreign sovereign states that have no nexus with the United States. Petitioner knows of no international usage of practice, foreign legislative act or decision by a foreign municipal court approving or favoring such an exorbitant reach of the competence of domestic courts.

Petitioner is confident that the United States Government would view with disquiet efforts by foreign municipal

its territory;

(b) the status of persons, or interests in things, present within its territory;

(c) conduct outside its territory that has or is intended to have substantial effect within its territory;

(2) the activities, interests, status, or relations of its nationals outside as well as within its territory; and

(3) certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests.

⁵ Now termed "jurisdiction to adjudicate" and "jurisdiction to enforce" by the *Restatement (Third)*, § 401(b) and (c). § 421(1) states with respect to "Jurisdiction to Adjudicate" as follows:

(1) A state may exercise jurisdiction through its courts to adjudicate with respect to a person or a thing if the relationship of the state to the person or thing is such as to make the exercise of jurisdiction reasonable.

courts to review the legality of the acts of the armed forces of the United States performed in the course of hostile operations. Petitioner respectfully submits that it, too, would have the most serious misgiving if the jurisdictional ruling below were to be upheld, and if claims or disputes which under the established practice of states have traditionally been made the subject of diplomatic espousal, international conciliation, or consensual arbitration or litigation in an international forum were to become the subject of litigation in the municipal courts of states, especially where the municipal courts have no connection with the parties and the matter in dispute. It is established international law that action by a state in prescribing or enforcing a rule that it does not have jurisdiction to prescribe or to enforce is a violation of international law, giving rise to the international responsibility of the state. *Restatement (Third) § 403, comment g.*)

Petitioner therefore urges that the jurisdictional ruling below be reversed in the first instance on the ground that it is violative of established principles of international law which have always been given effect by this Court.

II. THE COURT OF APPEALS ERRED IN RULING THAT THE FSIA IS NOT THE SOLE BASIS FOR FEDERAL COURT JURISDICTION TO HEAR CASES AGAINST FOREIGN STATES

A. THE FSIA PREEMPTS ALL OTHER FEDERAL LAWS GOVERNING THE SUABILITY OF FOREIGN STATES

Contrary to the court of appeals' holding, the FSIA is an all-encompassing statute which sets forth both the substantive and procedural standards that govern *all* suits that may be brought against foreign nations in state and federal courts in the United States. Although the statute provides that judicial, rather than executive, authorities should determine claims of foreign states to sovereign immunity from suit, it mandates that United States courts should "henceforth" decide claims of foreign states to im-

munity from suit "in conformity with the principles set forth in this chapter" (§ 1602, emphasis added). The principles prescribed by Congress in the FSIA embody the "restrictive" theory of sovereign immunity—*Verlinden B.V. v. Central Bank of Nigeria*, *supra*, 461 U.S. at 487—under which foreign nations are subject to suit only "insofar as their commercial activities are concerned" (§ 1602), i.e., for activities *jure gestionis*. With one exception noted below, non-commercial, governmental or sovereign activities of foreign states—activities *jure imperii*—cannot be made the subject of suit in the courts of the United States as a matter of established international law which Congress expressly incorporated into the FSIA.

To achieve these goals, the FSIA broadly provides that federal district courts "shall have original jurisdiction without regard to amount in controversy of any non-jury civil action against a foreign state . . . as to any claim . . . with respect to which a foreign state is not entitled to immunity" under the terms of the statute or any applicable international agreement (§ 1330(a)). The FSIA announces detailed standards for determining when immunity is to be accorded. The fundamental principle on which the statute is structured is that foreign states are "immune from the jurisdiction of the courts of the United States and of the States" unless an exception is found within the statute or applicable international agreements (§ 1604, emphasis added). Statutory exceptions from this general grant of immunity exist when immunity has been waived (§ 1605(a)(1)), when the claim arises from specified commercial activities of the sovereign state (§ 1605(a)(2)), when rights in property taken in violation of international law are at issue (§ 1605(a)(3)), when rights in specified property situated in the United States are involved (§ 1605(a)(4)), and when claims based on tortious injuries to persons or property occurring within the United States are in question (§ 1605(a)(5)). Finally, the FSIA also denies sovereign immunity in certain admiralty proceedings based on spec-

ified commercial activities engaged in by vessels of the foreign state (§ 1605(b)).

In addition, the FSIA sets forth detailed procedural rules for suits against foreign states, including special rules governing venue (§ 1391(f)), jury trial (§ 1330(a)), service of process (§ 1608), answers to complaints (§ 1608), counterclaims (§ 1607) and default judgments (§ 1608(e)).

This comprehensive Congressional scheme makes it patent that the Act was intended to be the sole jurisdictional source for suits against foreign sovereigns.⁶ Moreover, its legislative history makes it clear beyond peradventure that the statute was expressly "intended to preempt any other state or Federal law (excluding applicable international agreements) for according immunity to foreign sovereigns" H.R. Rep. No. 94-1487, 94th Cong., 2d Sess., 12, reprinted in [1976] U.S. Code Cong. & Admin. News 6604, 6610 (1975) ("H.R. 94-1487") (emphasis added). The balance, completeness and structural integrity of the FSIA convincingly refutes the majority's conclusion that "Congress was not focusing on violations of international law when it enacted the FSIA" (Pet.App. 11a).

The majority expresses the view (Pet.App. 12a) that because the restrictive theory of sovereign immunity—and consequently the FSIA, which codified that theory—is concerned principally with the commercial activities of foreign

⁶ Since the enactment of the FSIA, six different panels of the Second Circuit have consistently held that in actions against foreign states the Act preempts all other jurisdictional statutes. *Procefin de Venezuela v. Banco Industrial*, 760 F.2d 390, 392 (2d Cir. 1985); *Canadian Overseas v. Compania de Acero*, 727 F.2d 274, 277 (2d Cir. 1984); *O'Connell Machinery Co. v. M.V. "Americana"*, 734 F.2d 115, 116 (2d Cir. 1984), cert.denied, 469 U.S. 1086 (1984); *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 307-09 (2d Cir. 1981), cert. denied, 454 U.S. 1148 (1982); *Ruggiero v. Compania Peruana de Vapores*, 639 F.2d 872, 873, 879 (2d Cir. 1981); *Carey v. National Oil Corp.*, 592 F.2d 673, 676 (2d Cir. 1979).

states, suits drawing into issue a foreign state's governmental acts are not embraced by the statute. This bizarre view wholly misconstrues the restrictive theory of immunity as it has developed in customary international law and as it was adopted by Congress in the FSIA.

As the name suggests, the restrictive theory distinguishes between "governmental" or "sovereign" activities engaged in by states (*jure imperii*) and their private law activities—activities of the kind that may also be carried on by private persons (*jure gestionis*) *Restatement (Third)* § 451. It is the essence of the restrictive theory to "restrict" or limit the jurisdictional immunity of foreign states to all acts of a *jure imperii* nature, and to deny immunity only for acts *jure gestionis*. The majority's focus on only that aspect of the restrictive theory which defines the circumstances under which states are not immune from suit and its total disregard of the other aspect of the theory which mandates immunity is plainly erroneous.

Section 1604 of the FSIA provides in language admitting of no ambiguity that a foreign state is immune from jurisdiction of federal and state courts, subject only to the set of exceptions specified in §§ 1605 and 1607, and express jurisdictional provisions in treaties or international agreements to which the United States is a party which may provide a different rule. See also, H.R. Rep.No. 94-1407, *supra*, at 17: "Section 1604 would be the *only* basis under which a foreign state could claim immunity from the jurisdiction of any Federal or State Court in the United States" (emphasis added).

The court of appeals' construction of the FSIA is therefore plainly erroneous.

B. THE FSIA'S PROSCRIPTION OF SUITS DRAWING INTO ISSUE SOVEREIGN OR PUBLIC ACTS OF FOREIGN STATES IS CONSISTENT WITH RECENT INTERNATIONAL AND NATIONAL CODIFICATIONS OF THE DOCTRINE OF SOVEREIGN IMMUNITY

In passing the FSIA, Congress made it clear that it was the purpose of the legislation "to codify the so-called 'restrictive' principle of sovereign immunity, as presently recognized in international law." H.R. Rep. 94-1487, at 7. (See also *id.*, at 8: "Sovereign immunity is a doctrine of international law under which domestic courts, in appropriate cases, relinquish jurisdiction over a foreign state.") In addition, Congress instructed the courts to interpret and apply the Act consistently with international law. *Id.*, at 14.

A review of current international and national practice shows that no international organization or national legislative body has ever proposed to subject foreign states to the jurisdiction of national courts for extraterritorial acts performed in their sovereign or public capacity.

The passage of the FSIA has spurred much activity in the last decade on the international and municipal level to codify the law of sovereign immunity. Foremost among the international codification efforts has been the work of the United Nations' International Law Commission⁷ and

⁷ See, *Eighth Report on Jurisdictional Immunities of States and their Property* (Sompong Sucharitkul, Special Rapporteur), G.A. Doc. A/CN.4/396 (3 March 1986). In connection with the work of the I.L.C., the Legal Counsel of the United Nations circulated in 1979 a letter to Member States inviting them to submit relevant material on the topic of jurisdictional immunities, including national legislation, decisions of national tribunals and diplomatic and other correspondence. The responses of the Member States were published in *United Nations Legislative Series, Materials on Jurisdictional Immunities of States and their Property*, ST/LEG/SER.B/20 (1982) (hereafter "1982 U.N. Leg. Ser."), and may well contain the most comprehensive and authoritative compendium of materials collected on the topic.

of the Council of Europe. See European Convention on State Immunity and Additional Protocol of 1972, which came into force on June 11, 1976, when Austria, Belgium and Cyprus became the first three signatories to ratify the Convention and the Protocol.⁸ Also noteworthy is the recent codification effort by the Organisation of American States, culminating in the Inter-American Draft Convention on Jurisdictional Immunity of States, approved by the Inter-American Juridical Committee on January 21, 1983 (*reprinted in* 22 Int. Leg. Mat. 292 (1983).)

Both the European Convention and the two international draft conventions begin with the basic premise that foreign states are absolutely immune from suit, and they then carve out certain exceptions to the general immunity. Thus, the European Convention provides in Article 15:

A Contracting State shall be entitled to immunity from the jurisdiction of the courts of another Contracting State if the proceedings do not fall within Articles 1 to 14; the court shall decline to entertain such proceedings even if the State does not appear.

Unlike the FSIA, which in § 1605 seeks to define generically the non-immune acts of foreign states, the European Convention deals with specific situations. First, immunity is lost with respect to contracts which are to be performed in the forum state (Article 4.). However, immunity would not be lost if both parties to the contract are states, or if immunity is preserved in writing, or if the contract is a "*contract administratif*." Second, immunity is lost with

⁸ Reprinted in 1982 U.N. Leg. Ser. at 156. As of January 1, 1988, Luxembourg, The Netherlands and Switzerland have ratified the Convention and Protocol, and the United Kingdom has ratified the Convention only. The Federal Republic of Germany and Portugal have signed but not ratified the Convention and Protocol. See Council of Europe, European Treaties, No. 74, Chart of Signatures and Ratifications (01/01/88).

respect to employment contracts where the work is to be done in the forum state (Article 5.) However, here too, immunity is preserved if the plaintiff is a national of an employing state and the action is brought in that state. Immunity is also preserved if the plaintiff is not a national of, or habitually resident in, the forum state at the time the contract was entered into. Third, there is no immunity when the state participates in a business organization with private persons and the plaintiff's claim relates to the activity of the organization (Article 6.). Finally, there is no immunity when the state sets up a commercial office in the forum state and the proceeding relates to the business of that office (Article 7.).

The I.L.C.'s draft Convention's general immunity rule is set forth in Article 6 as follows:

State Immunity

A State is immune from the jurisdiction of another State in accordance with the provision of the present articles.

Effect shall be given to State immunity in accordance with the provisions of the present articles.

This general rule is followed by specifically defined exceptions to immunity (Commercial contracts, Article 12; Contracts of employment, Article 13; Personal injuries and damage to property, Article 14; Ownership, possession and use of property, Article 15; Patents, trademarks and intellectual or industrial property, Article 16; Fiscal matters, Article 17; Participation in companies, Article 18; State-owned or State-operated ships engaged in commercial service, Article 19; Effect of arbitration agreement, Article 20.).

The Inter-American Draft Convention on Jurisdictional Immunity of States sets forth the general immunity provision in Article 1 as follows:

A State is immune from the Jurisdiction of any other States.

Article 5 then provides the exceptions to the jurisdictional immunity in a general clause:

States shall not invoke immunity against claims relative to trade or commercial activities undertaken in the State of the *forum* [.]

followed by a specification of six specific instances in Article 6 when immunity is not available.

As concerns national legislation, the United Kingdom State Immunity Act of 1978, c. 33,⁹ which was in part enacted to implement the European Convention, follows closely the pattern of the Convention. It sets forth the general immunity rule as follows in Part I:

Immunity from jurisdiction

1. (1) A State is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this Part of this Act.

(2) A court shall give effect to the immunity conferred by this section even though the State does not appear in the proceedings in question.

The exceptions to immunity which are specified in Sections 2-13 follow the catalogue of non-immune acts listed in the European Convention.

The State Immunity Act of 1979 enacted by Singapore,¹⁰ the State Immunity Ordinance of 1981 passed by Pakistan,¹¹ and the Foreign States Immunity Act of 1981 en-

⁹ Reprinted in 1982 U.N. Leg. Ser. *supra*, n.7, at 41.

¹⁰ *Id.* at 28.

¹¹ *Id.*, at 20.

acted by South Africa¹² adopt almost verbatim the United Kingdom Act and follow its methodology of setting forth the general immunity provision, followed by detailed specifications of non-immune commercial or private law acts.

The Canadian State Immunity Act (1982)¹³ follows the patterns of the FSIA; it sets forth the general immunity rule followed by a generic description of non-immune acts ("A foreign state is not immune from the jurisdiction of a court in any proceedings that relate to any commercial activity of the foreign state" or "(a) any death or personal injury or (b) any damage to or loss of property that occurs in Canada." Sections 5 and 6 of the Canadian Act).

The latest national codification on the subject, the Australian Foreign State Immunities Act (1985),¹⁴ again follows more closely the United Kingdom Act in that it specifies in detail the non-immune commercial acts of foreign states which can be litigated in Australia. Like all other national legislation, it starts out with the general rule "Except as provided by or under this Act, a foreign State is immune from the jurisdiction of the courts of Australia in a proceeding." Section 9.

This cursory survey of recent international codification and municipal legislation belies the majority's assertion that under current international law foreign states are not immune from suit for violation of the law of nations.

It would be idle to cite any of the literally hundreds of recent decisions of national courts uniformly differentiating between sovereign or public acts and commercial acts of States, and denying immunity only in the latter category

¹² *Id.*, at 34.

¹³ 29-30-31 Elizabeth II, c. 95.

¹⁴ No. 196 of 1985, reprinted in 25 Int. Leg. Mat. 715 (1986).

of cases.¹⁵ Suffice it to say that the petitioner is unaware of a single instance where a municipal court has attempted to review in a private lawsuit the activities of a foreign state's armed forces in time of military conflict, where such activities had no nexus with the forum state.

C. THE LEGISLATIVE HISTORY OF THE FSIA CONFIRMS THAT THE ACT GOVERNS ALL ACTIONS AGAINST FOREIGN SOVEREIGNS

In *Verlinden B.V.*, *supra*, this Court painstakingly reviewed the provisions of the FSIA and its legislative history and concluded that the statute "contains a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state . . ." (461 U.S. at 488, emphasis added). Elsewhere in *Verlinden*, the Court repeatedly emphasized that the FSIA was "clearly intended to govern all actions against foreign sovereigns" (461 U.S. at 491 n.16, emphasis added).¹⁶

The majority here is wholly oblivious to the findings and declaration of purpose by Congress in § 1602 of the FSIA. It has interpreted the FSIA in a manner which negates the Act's own stated purposes. This a court may not do.

¹⁵ The decisions of national courts interpreting and applying the restrictive doctrine of sovereign immunity are conveniently reprinted in 1982 U.N. Leg. Ser., *supra*, n.7 at 181 ff.

¹⁶ Every Circuit that has addressed the issue agrees that the FSIA provides the exclusive basis for federal jurisdiction in civil actions against foreign states and their agencies. See, *City of Englewood v. Socialist People's Libyan Arab Jamahiriya*, 773 F.2d 31, 35 (3d Cir. 1985); *Williams v. Shipping Corp. of India*, 653 F.2d 875, 881 (4th Cir. 1981); *cert. denied*, 455 U.S. 982 (1982); *Gear v. Compania Peruana de Vapores*, 688 F.2d 417, 421 (5th Cir. 1982); *Frolora v. Union of Soviet Socialist Republics*, 761 F.2d 370, 372 (7th Cir. 1985); *Yugozport, Inc. v. Thai Airways Intern. Ltd.*, 749 F.2d 1373, 1375 (9th Cir. 1984); *cert. denied*, 471 U.S. 1101 (1985); *Jackson v. People's Republic of China*, 794 F.2d 1490, 1493 (11th Cir. 1986); *MacArthur Area Citizens Association v. Republic of Peru*, 809 F.2d 918, 919 (D.C. Cir. 1987).

New York State Dept. of Social Services v. Dublino, 413 U.S. 405, 420 (1973).

Judge Kearse, we submit, was correct in her dissent when she stated that "it is clear from both the statutory language and the legislative history that . . . the FSIA provides the exclusive framework within which the courts of the United States are to resolve a foreign state's claim of sovereign immunity." (Pet.App. 21a). Her conclusion that federal courts are not vested with subject-matter jurisdiction in suits against foreign states under the Alien Tort Statute is unassailable.

We therefore submit that the majority below erred in misconstruing the nature of the restrictive theory of sovereign immunity as it has developed in international law, and has disregarded the express provisions of § 1604 of the FSIA, the statute's legislative history and this Court's binding precedent in *Verlinden*. Its holding that in enacting the FSIA Congress did not evidence a clear design "to eliminate the jurisdictional grant of the Alien Tort Statute for violations of international law"¹⁷ (Pet.App. 12a)

¹⁷ The D.C. Circuit is the only appellate court which has addressed the question whether the FSIA preempts any arguable jurisdictional grant in the Alien Tort Statute for claims against foreign states. In *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C.Cir. 1984), cert. denied, 470 U.S. 1003 (1985), the court affirmed *per curiam*, with three separate concurring opinions, a dismissal of a suit against Libya and certain Arab organizations seeking damages for a terrorist attack in Israel. While the concurring opinions differed widely as to the construction of the Alien Tort Statute in suits against non-sovereign parties, two members of the panel expressly found that suit against the state of Libya was barred by reason of the exclusive jurisdictional grant contained in the FSIA. 726 F.2d at 776 n.1 (Edwards,J.) and at 805 n.13 (Bork,J.).

See also, *In re Korean Air Lines Disaster of September 1, 1983*, 597 F.Supp. 613 (D.D.C. 1984) (Alien Tort Statute does not confer competence on district courts in suits against a foreign state); *Siderman v. Republic of Argentina*, No. CV 82-1772-RMT (C.D.Cal., March 7,

is patently erroneous, and should be reversed by this Court.¹⁸

III. THE ALIEN TORT STATUTE DOES NOT PROVIDE A JURISDICTIONAL BASIS FOR SUITS AGAINST FOREIGN STATES

The court of appeals rested its jurisdictional ruling in this case squarely on the Alien Tort Statute, 28 U.S.C. § 1350 (Pet.App. 7a-10a). This was plain error.

As originally enacted in 1789, the Alien Tort Statute provided that the district courts "shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes

1985), appeal pending, 9th Cir. No. 85-5773 (same); *contra*, *Von Dardel v. U.S.S.R.*, 623 F.Supp. 246 (D.D.C. 1985) (alternative holding).

¹⁸ Argentina has, to date, not adopted the restrictive theory of immunity but accords to foreign states immunity on the basis of reciprocity.

The requirement of reciprocal treatment is codified in Article 2 of Law No. 21708, which amended Article 24 of the Law on the Organization of the National Courts, *Boletín Oficial*, December 28, 1977. The provision reads:

No action shall be taken on a complaint against a foreign State without first seeking from its diplomatic representative, through the Ministry of Foreign Affairs and Worship, the consent of that country to submit to proceedings. However, the executive branch may declare, by means of a duly substantiated decree, with respect to a particular country, that there is no reciprocity for the purposes of this provision. In such cases, the foreign State with respect to which such a declaration has been made shall be subject to Argentine jurisdiction. If the declaration of the executive branch specifies that the absence of reciprocity applies only in certain respects, the foreign country shall be subject to Argentine jurisdiction only in those respects. The executive branch shall declare that reciprocity is established when the foreign country so amends its rules.

For applications of that provision, see *Oppenlander De Soska v. Embassy of Ecuador*, 65 Int.L.Rep. 2 (S.Ct. Argentina, 1951); *Townshend de Briochetto v. Office of the Department of Commerce of Canada*, 65 Int.L.Rep. 1 (S.Ct. Argentina, 1949).

where an alien sues for a tort only in violation of the law of nations or a treaty of the United States." First Judiciary Act, ch. 20, § 9(b), 1 Stat. 73, 77.¹⁹

No legislative history on this provision has been uncovered. Charles Warren, in his historic article *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv.L.Rev. 49 (1923), barely mentions § 9(b) in passing. Following the Second Circuit's landmark decision in *Filartiga v. Pena-Irala*, 630 F.2d 876 (1980), which permitted the maintenance of a damage action based on the Alien Tort Statute by a Paraguayan national against another Paraguayan then residing in New York for torture committed in Paraguay, there has been a spate of speculation

¹⁹ In the 1878 revision and codification of federal statutes, the Act was changed to provide that "the district courts shall have jurisdiction . . . [o]f all suits brought by any alien for tort only' in violation of the law of nations, or of a treaty of the United States." Rev.Stat. § 563. The deletion of the reference to the state courts' concurrent jurisdiction did not make the district courts' jurisdiction exclusive, because the plan of the Revised Statutes was to enact a single section consolidating all instances of exclusive federal jurisdiction. Rev.Stat. § 711.

In 1911, the Act was reenacted in the following terms: "The district courts shall have original jurisdiction . . . [o]f all suits brought by any alien for a tort only, in violation of the law of nations or of a treaty of the United States." Act of March 3, 1911, ch. 231, § 24, 36 Stat. 1087, 1093. The 1911 codification continued the consolidation of all instances of exclusive federal jurisdiction in one section. *Id.* § 256, 36 Stat. 1160-61.

The current language was enacted as part of the 1948 revision of the Judicial Code. The words "civil action" were substituted for "suits" in view of Rule 2 of the Federal Rules of Civil Procedure. H.R. Rep. No. 308, 80th Cong., 1st Sess., app. at 124 (1947) (reviser's notes). The 1948 revision repealed the former section listing all instances of exclusive jurisdiction, and instead made express provisions for exclusive jurisdiction in the individual sections vesting the federal courts with jurisdiction. See, P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *Hart & Wechsler's The Federal Courts and the Federal System* 418 (2d ed. 1973).

by courts²⁰ and legal scholars²¹ as to the purpose and meaning of this statute.

Despite this recent focus on the history and meaning of the statute, it is fair to state that Judge Friendly's observation appears as valid today as it was when made over decade ago: "This old but little used section is a kind of legal Lohengrin . . . no one seems to know whence it came." *ITT v. Vencamp, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975).

Petitioner does not propose to settle in this brief the academic controversy as to the origin, purpose or meaning of the Alien Tort Statute, or to proffer yet another hypothesis as to what Oliver Ellsworth—the acknowledged author, whose hand-written draft of the Statute the respondents have included in the joint appendix herein, J.A. 112—may have intended.

The statute is plainly jurisdictional. It confers subject-matter jurisdiction on federal courts, concurrent with the courts of the states, in suits (1) by an alien, (2) for a tort only, (3) committed in violation of the law of nations or (4) a treaty of the United States. It says nothing about who the defendant in such a suit might be. It is silent on the substantive law that should govern a claim for relief asserted under the Statute.

It is remarkable that in its 180-year existence prior to the enactment of the FSIA, no court, legal scholar or

²⁰ *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C.Cir. 1984), *cert.denied*, 470 U.S. 1003 (1985) (Edwards, J., 726 F.2d at 777-86; Bork, J., *id.* at 812-19). *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 206-07 (D.C.Cir. 1985).

²¹ Randall, *Federal Jurisdiction Over International Law Claims: Inquiries into the Alien Tort Statute*, 18 N.Y.U.J. Int'l L. & Pol. 1 (1985); Randall, *Further Inquiries into the Alien Tort Statute and a Recommendation*, *id.*, at 473; Casto, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 Conn.L.Rev. 467 (1986).

advocate ever contemplated the Alien Tort Statute as a potential jurisdictional basis for a personal suit against a foreign state.²² It is even more remarkable that if the First Congress had contemplated § 9(b) of the Judiciary Act as a potential vehicle for suits against foreign sovereigns, the mere possibility of such an unprecedented judicial involvement in the relationship between this fledgling Republic and other sovereigns would have failed to elicit some recorded reaction from the members of the First Congress or in contemporary chronicles.

The court of appeals here did not, to be sure, fully adopt respondents' theory that the Alien Tort Statute was originally designed to confer competence on United States courts to hear personal claims against foreign sovereigns:

As a preliminary matter, it may be—at least as to a loss of a vessel under the circumstances alleged here—that absolute sovereign immunity did not govern when the Alien Tort Statute was enacted. . . . We need not decide, however, whether a court faced with the circumstances of this case in 1789 . . . would have exercised jurisdiction over a foreign sovereign. In construing the Alien Tort Statute, "courts must interpret international law not as it was in 1789, but as

²² See the comprehensive catalogue of published opinions referring to the Alien Tort Statute between 1793-1980 in Prof. Randall's insightful paper, *supra*, n.21, 18 N.Y.U.J. Int'l L. & Pol. at 4, n. 15.

The only time this Court considered the Alien Tort Statute was in a suit brought by an alien against the American commanding general in Cuba following the Spanish-American war, claiming that a taking of her property by the U.S. occupation authorities had been in violation of the law of nations and a treaty of the United States. *O'Reilly de Camara v. Brooke*, 209 U.S. 45 (1908). The Court affirmed the dismissal of the suit on the ground that the acts of the American commander did not amount to a tort, since the Executive and Congress had ratified and adopted the commander's activities.

it has evolved and exists among the nations of the world today."

(Pet. App. 8a-9a), citing *Filartiga v. Pena-Irala*, *supra*, 630 F.2d at 881.

Having said this, the court of appeals then shut its eyes to the accepted principles of international law governing the suability of foreign states as they have now developed—and as comprehensively codified by Congress in the Foreign Sovereign Immunities Act—and embarked upon developing a novel rule of competence of domestic courts to review the public acts of foreign states where violations of international law are alleged. It did so under the guise of interpreting the Alien Tort Statute, which it regarded as a continuing mandate by the First Congress to the lower federal courts to expand their competence as changed circumstances may, in the court's view, dictate. In other words, to engage in a process akin to the process which this Court engages in when it interprets and applies the Constitution of the United States.

The vice of this approach is that it disregards the settled rule that lower federal courts are courts of limited jurisdiction and may exercise jurisdiction only in such cases or controversies as is expressly conferred upon them by Congress. *Insurance Corp. v. Compagnie des Bauxites*, 456 U.S. 694, 701 (1982); *Cary v. Curtis*, 3 How. (44 U.S.) 236, 245 (1845). As Judge Kearse aptly pointed out in her dissent, Congress has conferred no power upon the lower federal courts to fashion novel jurisdictional rules depending on the vicissitudes of "evolving standards of international law" (Pet.App. 19a). In addition, purporting to interpret the Alien Tort Statute in the light of modern developments, the court of appeals wholly ignored the current established rule of international law that jurisdiction to adjudicate depends on jurisdiction to prescribe, both in domestic cases and under international law. This was plain error. See *Restatement (Third)*, §§ 401, 421 (*supra*, n. 5);

see also Singer, *Abandoning Restrictive Sovereign Immunity: an Analysis in Terms of Jurisdiction to Prescribe*, 26 Harv.J.Int'l L. 1 (1985).

Finally, in its twisted interpretation of the Alien Tort Statute, the court of appeals also erred—as shown in Part II, *supra*—in assuming that in enacting the FSIA in 1976, Congress had neglected to address the jurisdiction of United States courts over of foreign states for potential violations of international law, and that therefore it was incumbent on the court of appeals to fill the interstice. In this context, Justice Frankfurter's remark is apposite: "[i]mportant shifts in jurisdiction ought to be the product of something more persuasive than what is made to appear as a fit of Congressional absentmindedness." *Williams v. Austrian*, 331 U.S. 642, 680 (1947) (Frankfurter, J., dissenting).

But more importantly, where, as it has done in the FSIA, Congress has only recently enacted a comprehensive legislative scheme defining the competence of domestic courts in suits against foreign states, including an integrated system of procedures for notification and enforcement, it is not for the courts to fashion new rules of competence under a two-centuries old statute that was never used as a jurisdictional basis for suits against foreign states prior to the enactment of the FSIA.

The court of appeals' reliance on the Alien Tort Statute in justifying the exercise of jurisdiction over the petitioner under the circumstances of this case is therefore ill-founded, and should be reversed by this Court.

IV. THE COURT OF APPEALS' ERRED IN HOLDING THAT PERSONAL JURISDICTION OVER THE PETITIONER MAY BE ASSERTED IN THIS CASE

In addition to lack of competence under the FSIA and under the Alien Tort Act, there is also no basis on which *in personam* jurisdiction could be asserted over the petitioner in this instance. There is a manifest lack of

petitioner's constitutionally-required minimum contacts with the forum and no legal provision for its amenability to service of process, both of which are prerequisites to a court's exercise of personal jurisdiction.

A. PETITIONER LACKS THE CONSTITUTIONALLY-MANDATED MINIMUM CONTACTS WITH THE FORUM AND THEREFORE IS NOT SUBJECT TO THE COURT'S IN PERSONAM JURISDICTION

Petitioner is beyond the court's jurisdictional reach because it does not have a "constitutionally sufficient relationship" with the forum. *Omni Capital Int'l v. Rudolf Wolff & Co.*, 484 U.S. —, 98 L.Ed.2d 415, 424 (1987).

In addressing the issue of personal jurisdiction, the court of appeals began correctly by reciting the fundamental constitutional principle that "a non-resident defendant must have sufficient contacts with the forum" before a court in this country can lawfully hear a claim against it (Pet.App. 14a); but it then engaged in a sophisticated analysis to reach the untenable conclusion that Argentina has the requisite substantial contacts with the United States.²³ This conclu-

²³ Because of its disregard of the FSIA's provisions dealing with subject-matter jurisdiction, the majority also disregarded the Act's built-in provisions governing assertions of personal jurisdiction against foreign states. This court succinctly summarized the statutory scheme in *Verlinden, supra*, as follows:

Under the Act, however, both statutory subject-matter jurisdiction (otherwise known as "competence") and personal jurisdiction turn on application of the substantive provisions of the Act. Under § 1330(a), federal district courts are provided subject-matter jurisdiction if a foreign state is "not entitled to immunity either under sections 1605-1607 . . . or under any applicable international agreement"; § 1330(b) provides personal jurisdiction wherever subject-matter jurisdiction exists under subsection (a) and service of process has been made under 28 U.S.C. § 1608. Thus, if none of the exceptions to sovereign immunity set forth in the Act applies, the District Court lacks both statutory subject-matter and personal ju-

sion is palpably in conflict with the holdings of this Court, beginning with the seminal case of *International Shoe Company v. Washington*, 326 U.S. 310 (1945).²⁴

The requirement that a court have *in personam* jurisdiction over a defendant before it can render a valid judgment personally binding on him "flows . . . from the Due Process Clause." *Insurance Corp. v. Compagnie des Bauxites*, 456 U.S. 694, 702 (1982). This restriction on judicial power "recognizes and protects an individual liberty interest." *Id.* Consequently, it is settled constitutional doctrine that before a court may exercise personal jurisdiction over a nonresident defendant, it must be shown that the defendant has "certain minimum contacts" with the forum so that maintenance of the suit would not offend "traditional notions of fair play and substantial justice." *International Shoe Co.*, *supra*, 326 U.S. at 316.

In *Hanson v. Denckla*, 357 U.S. 235 (1958), this Court made it explicit that it is *the defendant's*, not the plaintiff's, contacts with the forum which are pivotal to a due process analysis:

The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State . . . [I]t is essential that in each case that there be some act by which the *defendant* purposefully avails itself of the privilege of con-

jurisdiction. [461 U.S. at 485 n.5, emphasis added.]

§ 1605's itemization of non-immune transactions is a prescription of "the necessary contacts which must exist before our courts can exercise personal jurisdiction." H.R. Rep. No. 94-1487, *supra*, at 13.

²⁴ In enacting the FSIA, Congress expressly incorporated the due process principles enunciated in *International Shoe*. H.R. Rep. No. 94-1407, *supra*. Moreover, the Second Circuit has elsewhere expressly held that a foreign state may invoke the constitutional safeguards of the Due Process Clause. *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, *supra*, 647 F.2d at 313.

ducting activities within the forum State, thus invoking the benefits and protections of its laws.

357 U.S. at 253 (emphasis added). The principle that only the defendant's contacts with the forum are relevant in a due process analysis was only recently reaffirmed by this Court in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985):

Jurisdiction is proper . . . where the contacts proximately result from actions by the defendant *himself* that create a 'substantial connection' with the forum State.

(Emphasis in original); see also *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. —, 94 L.Ed.2d 92, 102 (1987).

In addition to the requirement that the contacts with the forum be those of the defendant's, the defendant must have "purposefully established [the] minimum contacts' in the forum State" before an exercise of personal jurisdiction can be found to comport with due process. *Asahi Metal Industry*, *supra*, 94 L.Ed.2d at 102. Consequently, a defendant's contacts may not merely be of a "random, fortuitous, or attenuated" character. *Burger King Corp.*, *supra*, 471 U.S. at 475. "The 'substantial connection' . . . between the forum State necessary for a finding of minimum contacts must come about by an *action of the defendant purposefully directed toward the forum State*." *Asahi Metal Industry Co.*, *supra*, 94 L.Ed.2d at 104, quoting *Burger King Corp.*, *supra*, 471 U.S. at 475 (emphasis in original).

Whenever a defendant engages in such "purposeful" activities in a forum, the defendant is deemed to have foreseen the possibility of being sued there on matters arising out of those activities. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). Consequently, if the defendant's "conduct and connection with the forum

are such that he should reasonably anticipate being haled into court there," he may be found to have the requisite minimum contacts with the forum. *Burger King Corp.*, *supra.*, 471 U.S. at 474.

However, even though the defendant may have purposefully established minimum contacts with the forum, it is necessary to consider still other factors before concluding that an assertion of jurisdiction would accord with the constitutional limitations of due process. For as this Court declared in *Burger King Corp.*, *supra.*, 471 U.S. at 476-77—

Once it has been decided that a defendant purposefully established minimum contacts within the forum State, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with "fair play and substantial justice." *International Shoe Co. v. Washington*, [*supra.*, 326 U.S. at 320]. Thus courts in "appropriate case[s]" may evaluate "the burden on the defendant," "the forum State's interest in adjudicating the dispute," "the plaintiff's interest in obtaining convenient and effective relief," "the interstate judicial system's interest in obtaining the most efficient resolution of controversies," and the "shared interest of the several States in furthering fundamental substantive social policies." *World-Wide Volkswagen Corp. v. Woodson*, [444 U.S. at 292].

Thus, "even if the defendant has purposefully engaged in forum activities," a court's exercise of personal jurisdiction over that defendant could still be deemed unreasonable and violative of due process. 471 U.S. at 477-78.

Here, the record is barren of any "substantial connection" or even of any minimum contacts between the petitioner and the United States in relation to the claims

asserted against it by the respondents. The alleged tort occurred on the high seas, off the coast of Brazil, resulting in damage to a Liberian-flag vessel that was owned and time-chartered by two Liberian corporations. The attack on the vessel occurred as a consequence of the Falkland Island/Malvinas conflict between the Argentine Republic and the United Kingdom. No activity of *petitioner's* took place in the United States in connection with this incident,²⁵ nor is there any basis on which to conclude that the petitioner "should [have] reasonably anticipate[d] being haled into court" in the United States for attacking this vessel in the South Atlantic. As this Court reemphasized only last term in *Asahi Metal Industry*, *supra.*, 94 L.Ed.2d at 102,

"[T]he constitutional touchstone" of the determination whether an exercise of personal jurisdiction comports with due process "remains whether the defendant purposefully established 'minimum contacts' in the forum State." [Citing *Burger King*, *supra.*, 471 U.S. 462, 474]

It is manifest that the petitioner did not in this instance purposefully establish such contacts, nor undertake any action "*purposefully directed toward*" the United States. *Asahi*, *supra.*, 94 L.Ed.2d at 104 (emphasis in original).

²⁵ Respondents' assertion (adopted in dictum by the court of appeals) that the high seas are to be considered waters subject to the jurisdiction of the United States and thus territory of the United States is not rational in the context of a non-U.S. flag vessel. However, even if the vessel involved had been U.S.-registered, "[s]uch an unprecedented assertion of jurisdiction against *foreign states* could interfere with the conduct of our foreign policy and impair relations between the United States and other governments." *McKeel v. Islamic Republic of Iran*, 722 F.2d 582, 589 (9th Cir. 1983) (emphasis in the original). "Moreover, under the principle of reciprocity . . . the United States could become subject to foreign jurisdiction" for incidents occurring on the high seas or other locations outside the United States. *Ibid.*

The court of appeals' conclusion to the contrary does not bear scrutiny:

First, in addressing the element of foreseeability, the court of appeals totally neglected to examine as a threshold matter the petitioner's "conduct and connection" in this instance with the United States, upon which any determination of foreseeability must be based. *Burger King Corp.*, *supra.*, 471 U.S. at 474.

Second, the court's statement that the petitioner was "on notice that it might be sued here" (Pet.App. 15a) is devoid of legal or factual support. The facts relied upon that supposedly warranted a finding of such notice were that (i) the United States had notified petitioner that the HERCULES would be passing the South Atlantic on neutral business, (ii) the HERCULES was engaged in transporting Alaskan oil to the U.S. Virgin Islands, and (iii) petitioner was aware of the United States' interest in protecting the freedom of the high seas. Such facts manifestly do not establish that the *petitioner* engaged in any purposeful activities directed at the United States for which it could have reasonably anticipated being haled into court in this country.²⁶

Third, notification by the United States of the HERCULES' presence in the South Atlantic was an act performed by the United States, not by the petitioner, and thus irrelevant in a due process analysis. The "unilateral

²⁶ Moreover, if one were to indulge in the assumption that petitioner was charged with knowledge of the intricacies of American Constitutional and domestic law, the only rational conclusion one could draw is that petitioner was on notice of the *International Shoe* doctrine. Petitioner would further be chargeable with notice that Congress, in enacting the FSIA, was aware of concerns that "our courts [not be] turned into small international courts of claims[.]' . . . open to all comers to litigate any dispute which any private party may have with a foreign states anywhere in the world." (Testimony of the Department of Justice's representative on the FSIA, quoted in *Verlinden B.V. v. Central Bank of Nigeria*, *supra.*, 461 U.S. at 490).

activity of another party or a third person is not an appropriate consideration when determining whether a defendant has sufficient contacts with a forum State to justify an assertion of jurisdiction." *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 417 (1984).

Fourth, the circumstance, as characterized by the court of appeals, that the HERCULES "was plying the United States domestic trade" (Pet.App. 15a) and that *the vessel or its owner or charterer* had some relationship with the United States is of no moment to a due process analysis.²⁷ This does not establish a link *by the petitioner* with the United States.

Fifth, the fact that the HERCULES was transporting oil "pursuant to a contract that called for payment in the United States," (Pet.App. 15a) a fact which petitioner did not know and could not have conceivably known at the time of the incident, is wholly irrelevant. Petitioner was not a party to, nor affected by, the contract and cannot be deemed to have established any contact with the United States by reason of respondents' banking activities in this country. Moreover, any suggestion that personal jurisdiction exists here because the disruption of contractual payments in New York allegedly caused an injury in the United States would fail to pass due process scrutiny. It is well settled that injury or effect alone—while perhaps sufficient to satisfy a long-arm statute requirement—does not permit

²⁷ The circumstance that the HERCULES, a Liberian vessel, was "transporting oil from one part of the United States to another part of the United States" (Pet.App. 15a) is obviously of relevance to the enforcement of United States safety and environmental regulations against the vessel; *see, e.g.*, 33 C.F.R. § 157.03(2), Coast Guard regulations defining "domestic trade." Contrary to the majority's implication, this does not mean that a foreign-flag vessel in international waters heading for an American port is within the territory of the United States, or that nonresidents coming in contact with such a vessel on the high seas thereby establish a nexus with the United States for personal jurisdiction purposes.

a finding of minimum contacts. See, e.g., *Burger King Corp.*, *supra*, 471 U.S. at 474.

Sixth, petitioner's awareness of the United States' interest in protecting the freedom of the high seas (Pet.App. 15a) hardly satisfies the constitutional requirement that the acts of the petitioner which are alleged to have caused injury to the respondents have certain minimum contacts with the United States.

Seventh, the fact that Argentina has generally "benefited from the freedom of the seas guaranteed by international law and the law of the United States" (Pet.App. 15a) does not constitute any purposeful availment by petitioner "of the privilege of conducting activities within the forum State," to support a finding that it has thereby invoked "the benefits and protections of [United States] law." *Hanson v. Denckla*, *supra*, 357 U.S. at 253. Any benefits accruing to the petitioner from such a "collateral relation to the [United States] will not support jurisdiction if they do not stem from a constitutionally cognizable contact with" the United States. *World-Wide Volkswagen Corp. v. Woodson*, *supra*, 444 U.S. at 299. No such contacts exist here.

Eighth, the issue of petitioner's ability to defend a suit in the United States (Pet.App. 15a) is entitled to no consideration in a due process analysis. For as this Court declared in *World-Wide Volkswagen Corp. v. Woodson*—

[e]ven if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its laws to the controversy; [and] even if the forum State is the most convenient location for litigation . . .

such factors do not render the assertion of *in personam* jurisdiction proper. *Id.* at 294.

Ninth, the Court of Appeals' observation (Pet.App. 15a) that if American courts were to decline jurisdiction under the facts asserted here, certain unspecified "substantive policies of international law will be undermined"²⁸ manifestly does not furnish an affiliating link between the petitioner and the United States.

And tenth, the final remark by the court of appeals that "fairness" favors exercise of personal jurisdiction over the petitioner since respondents claim to have been denied a judicial remedy in Argentina under Argentine law (Pet.App. 15a) is also devoid of weight in a due process

²⁸ Although these "substantive policies" had not been expressly identified, the majority's personal jurisdiction analysis begins with the observation "that certain universal offenses, like piracy and genocide are offenses against the law of nations wherever they occur . . . [and that the] allegations here probably fall within this class of offense." (Pet.App. 14a.) The majority then noted the argument advanced by some that "such occurrences always have sufficient effects' within the United States to satisfy due process." *Id.* Although the court did not base its finding of *in personam* jurisdiction on this theory, it nonetheless warrants some discussion.

The majority's observation is irrelevant to a due process analysis and its reliance on § 404 of the *Revised Restatement* (Tent. Draft No. 6, 1985)—now § 404 of the *Restatement (Third)*—is wholly misplaced. That section, entitled "Universal Jurisdiction to Define and Punish Selected Offenses," deals with "Jurisdiction to Prescribe"—the capacity of a state under international law to make a rule of law.

The pivotal inquiry here is whether under the circumstances of this case a state may under international law exercise jurisdiction to adjudicate a claim of law—to assert *in personam* jurisdiction over persons or legal entities—a subject that dealt with in § 421 of the *Restatement (Third)*. The majority patently confuses the distinct concepts of jurisdiction to prescribe and jurisdiction to adjudicate.

The concept of "universal" offenses connotes that any state may prescribe substantive rules prohibiting certain conduct and that it may enforce those rules if it gets hold of the alleged offender. It has nothing to do with the state's authority to subject an alleged offender to the process of its courts. See § 401 of the *Restatement (Third)*.

analysis. Like the United States, the petitioner regards certain claims arising out of its public law activities subject to settlement by means other than litigation. Cf. *Chaser Shipping Corp. v. United States*, 649 F.Supp. 736 (S.D.N.Y. 1986), *aff'd*, April 27, 1987 (No. 87-6027, 2d Cir.; unpublished opinion), *cert.denied*, November 11, 1987 (56 U.S.L.W. 3453). (A suit for damages suffered by foreign shipowner as a result of a surreptitious mining of a Nicaraguan harbor by an agency of the United States does not present a justiciable issue.)

In sum, there is a total absence of any affiliating contacts by the petitioner with the United States which would permit the assertion of *in personam* jurisdiction as a matter of constitutional law. The majority's conclusion "that there is no constitutional bar to the district court's exercise of jurisdiction over Argentina here" (Pet.App. 15a) is violative of the Fifth Amendment's Due Process Clause and disregards this Court's consistent and long-established constitutional holdings with respect to the personal reach of nonresident defendants.

By concluding that Argentina was in this instance subject to the court's *in personam* jurisdiction in connection with a suit filed by an alien, the court of appeals not only ruled contrary to law but inconsistent with the practical interests of this nation's judicial system and foreign policy. The Court of Appeals should have heeded this Court's admonition that "great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field." *Asahi Metal Industry Co. v. Superior Court*, *supra*, 94 L.Ed.2d at 106, quoting *United States v. First National City Bank*, 379 U.S. 378, 404 (1965) (Harlan, J., dissenting).²⁹

²⁹ Ironically, the Second Circuit itself has on past occasions expressed the same concern that "the assertion of personal jurisdiction 'must be applied with caution, particularly in an international context.'" *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, *supra*. 647

B. PETITIONER IS NOT AMENABLE TO SERVICE AND THEREFORE IS NOT SUBJECT TO THE COURT'S IN PERSONAM JURISDICTION

As this Court recently reiterated in *Omni Capital Int'l v. Rudolf Wolff & Co.*, *supra*, there must not only exist "a constitutionally sufficient relationship between the defendant and the forum," but there must also exist "a basis for the defendant's amenability to service of summons" before a court can exercise personal jurisdiction over that defendant.³⁰ "[T]his means there must be authorization for service of summons on the defendant." 98 L.Ed.2d at 424. The additional question presented here, as it was in *Omni*, is "whether there [was] authorization to serve summons in this litigation." *Id.* The court of appeals held that the procedural rules of the FSIA "would simply apply to a suit under [the Alien Tort Act] as well" (Pet.App. 13a). This was plainly erroneous.

Service of process in a federal action is generally governed by Rule 4 of the F.R.Civ.P. Under paragraphs (e)-(f) of that Rule, service may be made anywhere in the forum state or anywhere else if authorized by a federal statute or the forum state's long-arm statute. In the instant case, neither the Alien Tort Statute nor the New York long-arm statute authorized service of summons on Argentina, and thus there existed no basis on which the court could exercise personal jurisdiction over the petitioner.

The fact that the Alien Tort Act does not provide a basis for petitioner's amenability to service is not only

F.2d at 315 n. 37, quoting *Lesco Data Processing Equipment Corp. v. Maxwell*, 468 F.2d 1326, 1341 (2d Cir. 1972).

³⁰ Indeed, in *Omni* this Court stated that even if the Due Process Clause of the Fifth Amendment were not violated by the assertion of personal jurisdiction in a particular case, such assertion might still be improper if "other prerequisites to a federal court's exercise of personal jurisdiction," such as amenability to service, are not satisfied. 98 L.Ed.2d at 423.

plain from the language of the Act itself but is also implicitly conceded by respondents' exclusive reliance on the FSIA's service provisions in attempting to effectuate service on Argentina (*see*, Pet.App. 36a-42a).

The FSIA, however, is unavailable to respondents as authority for serving the petitioner in this case. The service provision of the FSIA, § 1608, was enacted by Congress for use in cases where the substantive provisions of the FSIA apply, *i.e.*, in cases where a foreign state, agency or instrumentality is subject to suit under §§ 1605-1607 of the Act and not entitled to immunity under § 1604. As the legislative history reflects, Section 1608 was viewed by the drafters as "closely interconnected with other parts of the bill" and as having an "integral role in the bill. . ." H.R. Rep.No. 94-1487, *supra*, at 23.

Whenever Congress enacts legislation that includes a special service provision—as it did in the FSIA—a litigant's permissible use of that service provision is limited *only* to those cases contemplated by the substantive provisions of the legislation. "The [service] provision cannot be carried beyond what Congress intended." *Lasch v. Antkies*, 161 F.Supp. 851, 852 (E.D. Pa. 1958). In seeking to use the FSIA as a service vehicle while at the same time *expressly* disclaiming the applicability of the FSIA to the merits of the action, the respondents have clearly followed a route "beyond what Congress intended."

Since the Alien Tort Act did not authorize service of summons on Argentina, "we look to the second sentence of Rule 4(e), which points to the long-arm statute of the State in which the District Court sits—here" New York, *Omni Capital Int'l v. Rudolf Wolff & Co.*, *supra*, 98 L.Ed.2d at 426, to determine whether Argentina was nonetheless amenable to service and thus subject to the court's *in personam* jurisdiction. We submit that the requirements

of the New York long-arm statute³¹ cannot be met in this instance; indeed, respondents have not even asserted that the court may reach Argentina in this manner.

In sum, the court of the United States may not exercise jurisdiction over Argentina without authorization to serve process. *Omni, supra*, 98 L.Ed.2d at 428. That authorization is not found either in the Alien Tort Act or the New York long-arm statute, and this fatal defect was a

³¹ The New York long-arm statute provides in relevant part:

[A] court may exercise personal jurisdiction over any nondomiciliary . . . who in person or through an agent:

1. transacts any business within the state; or
2. commits a tortious act within the state . . . ;
3. commits a tortious act without the state causing injury to person or property within the state . . . if he
 - (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state or,
 - (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce; or
4. owns, uses or possesses any real property situated within the state.

7B McKinney's Con. Laws of New York Ann CPLR § 302 (1972).

The present action did not arise out of any business transacted by Argentina in New York, is not based on a tortious act performed by Argentina in New York, and is not based on Argentina's contacts with New York and any tortious act performed outside New York that injured respondents in that state. As noted in the Practice Commentaries to CPLR § 302, "[a]n injury does not occur in New York simply because the plaintiff is domiciled or does business there." To conclude otherwise would be absurd since it would have the effect of subjecting "all the world to jurisdiction in New York anytime a New York domiciliary was injured." *Id.*

further and independent ground why personal jurisdiction could not be asserted over the petitioner.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

BRUNO A. RISTAU
Counsel of Record
 JOEL E. LEISING
 KAPLAN, RUSSIN & VECCHI
 1215 Seventeenth Street, N.W.
 Washington, D.C. 20036
 (202) 887-0353

Attorneys for Petitioner

June 30, 1988

MOTION FILED
SEP 1 1987

No. 87-1372

(A)

IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

ARGENTINE REPUBLIC,

Petitioner,

—v.—

AMERADA HESS SHIPPING CORPORATION
and UNITED CARRIERS, INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

**MOTION BY THE INTERNATIONAL ASSOCIATION
OF INDEPENDENT TANKER OWNERS (INTER-
TANKO) FOR LEAVE TO FILE BRIEF AS AMICUS
CURIAE ONE DAY OUT OF TIME**

CHRISTOPHER B. KENDE

Counsel of Record

HILL, BETTS & NASH

One World Trade Center

Suite 5215

New York, New York 10048

(212) 839-7000

Attorney for Amicus Curiae
International Association of
Independent Tanker Owners
(INTERTANKO)

7 pp

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OF INDEPENDENT TANKER OWNERS (INTER-
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CURIAE ONE DAY OUT OF TIME**

The International Association of Independent Tanker Owners (INTERTANKO) respectfully moves this Honorable Court for leave to file its brief as *amicus curiae* in support of respondents one day out of time. In support of its motion, INTERTANKO states as follows:

1. INTERTANKO is an international, non-profit organization representing about 80 percent of the world's independently owned tanker fleet, totalling approximately 135,000,000 dwt. It is vitally interested in the issues raised by this appeal.

2. The Court's schedule provided for the filing of respondents' brief in this matter and briefs as *amici curiae* in support of respondents by August 30, 1988.

3. INTERTANKO's original motion for leave to file its brief as *amicus curiae* and brief in support of respondents was transmitted by Federal Express to this Court, rather than by United States mail, directly by the printer of the brief, Record Press, Inc., on August 30, 1988.

4. The original motion for leave to file brief and brief as *amicus curiae* on behalf of INTERTANKO was received by this Court on the next day, August 31, 1988.

5. Counsel for INTERTANKO had instructed Record Press to file the brief by mailing ~~copy~~ by Express Mail with the United States Postal Service on or before August 30, 1988 in accordance with this Court's Rule 28.2. Apparently, Record Press disregarded this instruction and, instead, without advising counsel for *amicus*, transmitted the brief to this Court by Federal Express. (See Affidavit of Helena M. Green submitted herewith).

6. Copies of the original motion for leave to file brief as *amicus curiae* and brief were served by mail on all parties to these proceedings within the original time for filing of the brief on August 30, 1988. Therefore, the granting of this motion will not prejudice any of the parties or delay the briefing schedule.

7. A similar motion made by the American Jewish Congress, *et al.*, as *amicus curiae* in *Patterson v. McLean Credit Union* (No. 87-107), was recently granted by the Court. *Patterson, supra*, ___ U.S. ___, 108 S.Ct. 2893, 101 L.Ed.2d 928, 56 U.S.L.W. 3894 (1988).

WHEREFORE, it is respectfully requested that the Court grant the instant motion by INTERTANKO for leave to file its brief as *amicus curiae* in support of respondents one day out of time.

Respectfully submitted,

/s/ CHRISTOPHER B. KENDE
CHRISTOPHER B. KENDE
Counsel of Record
HILL, BETTS & NASH
One World Trade Center
Suite 5215
New York, New York 10048
(212) 839-7000

Attorney for Amicus Curiae
International Association of
Independent Tanker Owners
(INTERTANKO)

September 1, 1988

SUPREME COURT OF THE UNITED STATES

No. 87-1372

ARGENTINE REPUBLIC,

Petitioner,

—v.—

AMERADA HESS SHIPPING CORPORATION and
UNITED CARRIERS, INC.,

Respondents.

STATE OF NEW YORK)
)
COUNTY OF NEW YORK)

HELENA M. GREEN, Being duly sworn, deposes and says:

1. I am an employee of Record Press, Inc., printers for the movant herein, and as such am fully familiar with the facts herein. I make this affidavit in support of the instant motion to grant leave to file the *amicus* brief for the International Association of Independent Tanker Owners (INTERTANKO) one day out of time.

2. On August 30, 1988 I had spoken with Christopher Kende, (Counsel of Record) who had instructed me to serve and file his brief with the United States Supreme Court via Express Mail. Unfortunately, I inadvertently sent the aforementioned brief via Federal Express. Although the brief was actually received by the Court on August 31, 1988, the Clerk of the Court informed Mr. Kende that the brief could not be accepted for filing because it was not considered timely. The one day delay in the filing of the brief was due to an error on our part, not to any delay by INTERTANKO or Counsel.

WHEREFORE, the affiant herein, respectfully requests that the motion herein be granted.

Respectfully Submitted,

/s/ HELENA M. GREEN
 Helena M. Green
 RECORD PRESS, INC.
 157 Chambers Street
 New York, New York 10007
 (212) 619-4949

Sworn to before me this 31st
 day of August, 1988

NURI S. ANSARI
 Notary Public, State of New York
 No. 31-4783512
 Qualified in New York County
 Commission Expires December 31, 1989

/s/ NURI S. ANSARI
 Nuri Ansari
 Notary Public

PROOF OF SERVICE BY MAIL

I am a member of the Bar of this Court and a resident of the City of New York and the County of New York; I am over the age of eighteen years and not a party to the within action; my business address is: Suite 5215, 1 World Trade Center, New York, New York 10048.

On September 1, 1988, I served the within Motion by the International Association of Independent Tanker Owners (INTERTANKO) for Leave to File Brief as *Amicus Curiae* One Day Out of Time on the Parties in this action by placing three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at New York, New York, addressed as follows:

Bruno A. Ristau
 Kaplan Russin & Vecchi
 1215 Seventeenth Street, N.W.
 Washington, D.C. 20036
Counsel of Record for Petitioner

Douglas R. Burnett
 Hill Rivkins Carey Loesberg O'Brien & Mulroy
 21 West Street
 New York, New York 10006
Counsel for Respondent
Amerada Hess Shipping Corporation

Raymond J. Burke, Jr.
 Burke & Parsons
 1114 Avenue of the Americas
 New York, New York 10036
Counsel for Respondent
United Carriers, Inc.

Hon. Charles Fried, Solicitor General
 Department of Justice
 Washington, D.C. 20530
Counsel of Record for the
United States as Amicus Curiae

All Parties required to be served have been served.

I certify, under penalty of perjury, that the foregoing is true and correct.

Executed on September 1, 1988, at New York, New York.

/s/ CHRISTOPHER B. KENDE
Christopher B. Kende

13

ARGENTINE REPUBLIC

Plaintiff

**AMERICA RIVER SHIPPING CORPORATION and
UNITED CARRIERS, INC.**

Respondent

**THE COURT OF APPEALS OF THE UNITED STATES
IN AND FOR THE DISTRICT OF COLUMBIA**

**AMERICA RIVER SHIPPING CORPORATION
and
UNITED CARRIERS, INC.
Plaintiffs
v.
AMERICA RIVER SHIPPING CORPORATION
and
UNITED CARRIERS, INC.
Respondents
New York, NY 10006
JULY 1968**

**Lawrence J. Rosen, Jr.
Edward A. Rosen
Francis A. Rosen
James J. Rosen
110 West 41st Street
New York, NY 10018
(212) 694-3000**

**Attorneys for Respondent
United Carriers, Inc.**

**Attorneys for Respondent
America River Shipping
Corporation**

87-90

QUESTIONS PRESENTED

1. Whether the Alien Tort Statute of 1789 provides jurisdiction over a claim by a neutral shipowner, engaged in the United States domestic trade, for an illegal attack against its vessel on the high seas by a foreign state, where the state has also declined redress in violation of international law.
2. Whether the Foreign Sovereign Immunities Act of 1976 ("FSIA") must be construed as preempting the Alien Tort Statute, and as extending immunity to foreign states where international law would not accord it.
3. Whether (i) admiralty jurisdiction and (ii) universal jurisdiction are present in this case.

The caption of the case in this Court contains the names of all the parties. The listing required by Sup. Ct. R. 28.1 appears in respondents' joint brief in opposition to the petition for *certiorari* at 4, n.3.

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IN THE

Supreme Court of the United States

October Term, 1987

ARGENTINE REPUBLIC,

Petitioner,

v.

AMERADA HESS SHIPPING CORPORATION and
UNITED CARRIERS, INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS

Opinions Below

The opinion of the court of appeals (Pet. App. 1a-21a), is reported at 830 F.2d 421 (1987). The opinion of the United States District Court for the Southern District of New York (Pet. App. 25a-35a) is reported at 638 F. Supp. 73 (1986).

Jurisdiction

The judgment of the court of appeals was entered September 11, 1987 (Pet. App. 22a). The petitioner's petition for rehearing and suggestion for rehearing *en banc* were denied on November 18, 1987 (Pet. App. 24a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

**Constitutional Provisions, Statutes, Treaties,
and Foreign Law Involved***

Constitutional Provisions

1. U.S. CONST. art. IV, § 8, cl.10.
2. U.S. CONST. art. III, § 2, cl.1.
3. U.S. CONST. amend. V.

Statutes

4. The Alien Tort Statute, 28 U.S.C. §1350 (1982).
5. The Merchant Marine Act of 1920, 46 U.S.C. §861 *et seq.* (1982).
6. The Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. §§ 1330, 1332 (a) (2)-(4), 1391 (f), 1441 (d), 1602-1611 (1982).

Treaties

7. Geneva Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312.
8. Pan-American Convention Relating to Maritime Neutrality, Feb. 20, 1928, 47 Stat. 1989.
9. Treaty of Friendship, Commerce and Navigation, Aug. 8, 1938, United States-Liberia, 54 Stat. 1739, T.S. No. 956.
10. Convention between Great Britain and Buenos Ayres, for the Settlement of British Claims. Signed at Buenos Ayres, 19th July, 1830.

Foreign Law

11. Constitution of the Argentine Republic.
12. Argentine Decree of November 4, 1828.
13. Spanish Corsair Ordinance of 1801.
14. Argentine Provisional Regulation For Privateering of 1817.

* These are reproduced, in relevant part, at App. 1a-10a, *infra*.

Statement Of The Case

I. The Facts

A. The Respondents

On April 26, 1977, United Carriers, Inc. ("United"), owner of HERCULES, a 220,117 deadweight ton tanker of Liberian Registry, time-chartered that vessel to Amerada Hess Shipping Corporation ("Amerada Hess") for a five year period, subsequently extended by agreement.¹ The charter was negotiated and executed in New York City and required payment of monthly hire in New York as well (JA39-41).² Both United's agents and Amerada Hess operated the vessel from New York City (JA61-62).

From the opening of the Trans-Alaska Pipeline System in 1977, HERCULES was continuously employed in the domestic inter-coastal trade of the United States, carrying full cargoes of Alaska North Slope crude oil from the southern terminus of the Trans-Alaska Pipeline at Valdez, Alaska, around the southern tip of South America to the Hess Oil Virgin Islands Company ("HOVIC") refinery located at St. Croix, U.S. Virgin Islands. All of the Alaska oil carried by HERCULES was ultimately consumed in the continental United States or purchased directly by the U.S. government. The participation of HERCULES in U.S. domestic trade was specifically provided for pursuant to the Merchant Marine Act of 1920.³

Under the terms of the charter, Amerada Hess was obligated to pay for the bunkers (ship's fuel) used by the vessel and it was the practice of Amerada Hess to bunker HERCULES for each round-trip voyage at the HOVIC refinery at St. Croix (JA48). The

¹ The provisions of the charter party underscore close ties to the United States, i.e., hire (JA41), U.S. Law and General Average (JA52), Clause Paramount incorporating U.S. Carriage of Goods by Sea Act of 1936 (JA55-56), and New York arbitration (JA57-58).

² "JA" refers to the Joint Appendix before this Court and "A" refers to the Joint Appendix before the court of appeals.

³ 46 U.S.C. § 877. As to the peculiar status of HERCULES as a foreign-flag vessel trading in domestic, interstate U.S. commerce, see *American Maritime Ass'n v. Blumenthal*, 590 F.2d 1156, 1158-1160, 1166-1168 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 943 (1979).

bunkers for the ship's fatal voyage were purchased in New York City and delivered to the ship at HOVIC harbor (A58).

B. AMVER

HERCULES was a participant in the AMVER System (Automated Merchant Vessel Reporting System), an international vessel position reporting system operated by the U.S. Coast Guard in New York City, which coordinates assistance to ships in distress, regardless of nationality (A62). Argentine flag vessels also routinely use this system. Military use of information transmitted on AMVER by merchant vessels is strictly forbidden by international custom and practice (A67). The local AMVER reporting station for ships transiting the South Atlantic is "General Pacheco", a radio station operated by the Government of Argentina (A62, A68). HERCULES routinely transmitted to "General Pacheco" while in the South Atlantic, giving her name, international call sign, registry, position, course, speed and voyage description.

C. The War

On April 2, 1982, armed forces of the Argentine Republic invaded the Falkland Islands/Islands Malvinas. The outbreak of the war found HERCULES in the vicinity of Valdez, Alaska where she loaded a full cargo of Alaska North Slope crude oil for delivery to the HOVIC refinery at St. Croix. There was only one route for HERCULES' trade—around Cape Horn: with a beam (width) of 158 feet, she was unable to pass through the Panama Canal, which is restricted to vessels with beams of under 107 feet.

On May 2, 1982, HMS CONQUEROR, a Royal Navy submarine, torpedoed and sank GENERAL BELGRANO, an Argentine Navy cruiser. At about 1325⁴ on May 5, 1982, HERCULES approached the area where GENERAL BELGRANO sank. The Master of HERCULES entered into contact with the Argentine Navy warship BAHIA PARAISO and offered to help look for survivors. The Captain of BAHIA PARAISO assigned HERCULES a search area in conjunction with a search area assigned to the Chilean Navy warship, PILOTO PARDO. At about 0230 on the following day,

⁴ All times referred to herein are Greenwich Mean Time (GMT).

HERCULES completed the search of her sector and returned to her original course (JA70). During the search and rescue operation, Argentine naval and air forces had ample opportunity to inspect HERCULES. Thereafter, HERCULES completed her voyage to St. Croix, where her cargo of Alaskan crude oil was discharged and preparations made for the next run to Valdez.

D. Prelude to the Attack

On May 25, 1982, HERCULES departed St. Croix in ballast (i.e., without cargo) bound for Valdez. As usual, prior to sailing she had taken on a full load of bunkers. On June 2, Argentine military aircraft attacked the British-flag tanker WYE in the South Atlantic. The following day, the U.S. Maritime Administration ("MARAD") sent telexes to Argentina and the United Kingdom listing U.S. flag merchant vessels and U.S. interest Liberian flag tankers calling at Argentine ports or transiting the South Atlantic (JA59-60). The telex which was sent to the Argentine Embassy in Washington, D.C., stated in relevant part:

3. The following Liberian-flag tankers are carrying Alaskan oil to the U.S. Virgin Islands via Cape Horn:

Hercules/6ZAB	Enroute St. Croix,	ETA Exclusion Zone
	VI, to Valdez, Al	8-11 June

(JA60)

The purpose of this advice was to ensure that neither belligerent would attack neutral U.S. flag or U.S. interest vessels.

HERCULES stopped briefly at Rio de Janeiro, Brazil on June 4, 1982 for vessel support services and resumed her intended voyage around Cape Horn to Alaska. At all times, she flew the Liberian flag and was painted and outfitted as a commercial tanker. Across her stern, in accordance with international law, the vessel's name, "HERCULES", and her home port, "Monrovia", were painted in bold-faced white letters. The vessel's name was also painted on both her bows (JA63).

E. The Attack

At about 1215 on June 8, 1982, the Master of HERCULES made his routine AMVER report to the Argentine shore radio

station "General Pacheco" giving the vessel's name, international call sign, registry, position, course, speed, and voyage description of "Rio de Janeiro to Valdez, Alaska via Cape Horn" (JA 621). At about 1300, a four-engine Argentine military aircraft began circling HERCULES which was then steaming on a steady course at a steady speed. Concerned by this development, the Master repeated his earlier AMVER message at about 1344 and received a "QSL" (message received) acknowledgment from "General Pacheco" (JA62 and JA69).

Six minutes later, at about 1350, at 46° 10' South, 49° 30' West, HERCULES was attacked by an Argentine military aircraft in a low level bombing strike. The Master immediately hoisted a white flag (JA63). At this point, the vessel was 572 nautical miles from the nearest point on the Argentine mainland and 475 nautical miles from the Falkland Islands/Malvinas, well outside the exclusion zones declared by the belligerents (JA25 and JA61).

At about 1430 at 45° 16' South, 49° 25' West, the vessel was subjected to a second bombing attack. Finally, at about 1625 at 46° 08' South, 48° 55' West, HERCULES was subjected to a third attack by Argentine jet aircraft which struck the vessel with air to surface rockets. Following the third attack, the vessel changed course and steered for the nearest safe port of refuge, Rio de Janeiro, Brazil (JA61-69).

At about 1720 and 1800, *well after the end of the third attack*, an Argentine radio station, call sign LOV 3, located at the Argentine naval base at Ushusia, sent messages in English to call sign 6ZAB, HERCULES, on the international distress frequency of 2182 KZ. (JA61-68) The text of the message, spoken in plain English, was:

Steer 270 to make Argentine Port. If you cannot make Argentine Port you will be attacked in 15 minutes time. (JA66).

These messages were received by four other ships in the area, the British hospital ships UGANDA, HECKLA, HERALD and HYDRA (JA67).

The telephone log maintained by the cognizant U.S. Coast Guard Admiral summarizes the telephone conversation between

the Defense Intelligence Agency and the Master of the stricken ship:

Story on Attack: at 1000 local 4 engine propeller aircraft painted camouflage started circling, at 1115 attacked with depth charges, 2 hit deck, others hit hull on starboard. Then ASW type aircraft showed up and dropped 3 depth charges that landed 200 from bridge. 2 hours later 3 jet A/C arrived and one fired 2 rockets at ship, one hit. Master said he received verbal warning on 2182 fm AR. Says he spoke to AR, explained the situation and damages, and received permission to proceed without diverting to AR port (JA69).

As a direct result of the Argentine bombing and rocket attack, HERCULES suffered extensive hull and deck damage. Significantly, a bomb penetrated the ship's starboard side, lodging in the bottom of the ship's No. 2 tank, where it remained, undetonated.

F. Post Attack Events

On June 9, 1982, the Government of Liberia issued a statement which said, in part:

...the vessel is currently heading back to Rio de Janeiro in damaged condition. By directive of the Commissioner [of Maritime Affairs of the Republic of Liberia], the matter was reported to Admiral Sheer, Maritime Administrator of the United States, the established point of contact for vessels in danger. Admiral Sheer has contacted the Argentine and British Governments to prevent further attack on neutral vessels. Meanwhile, Deputy Commissioner George B. Cooper is working along with Ambassador Joseph Guannu, Liberian Ambassador accredited to the United States, in formulating measures to prevent any additional attacks on Liberian vessels plying international waters. (JA75-76).

Shortly thereafter, a senior official of the Argentine Embassy was summoned to the U.S. Department of State where a formal oral demarché was delivered regarding the unprovoked attack on HERCULES (JA72).

On June 12, 1982, HERCULES arrived at the port of refuge, Rio de Janeiro, Brazil. Immediately upon arrival, Brazilian naval

officers under the authority of the Captain-of-the-Port boarded the vessel and conducted a complete investigation into the circumstances surrounding the bombing of HERCULES.

The vessel's logs were verified and statements were obtained from the ship's officers. The Brazilian naval inquiry found nothing connected with HERCULES which would violate her neutral status under international law or justify the attacks on her (A81).

On June 21, 1982, the Government of Liberia, in notes directed to both the British and Argentine Governments, requested clarification of the attacks on HERCULES. On July 5, 1982, the United Kingdom replied, denying any involvement in the attack and stating that British Military Intelligence had confirmed that the attacking aircraft were from Argentina (JA73-74). No response was ever received from the Argentine government (JA72).

Damage from the attacks, and the presence of the undetonated bomb in No. 2 port wing tank, led United to determine that it was unreasonably hazardous to attempt to remove the undetonated bomb. Accordingly, on July 20, 1982, HERCULES was scuttled, along with her bunkers, at a point approximately 250 miles from the Brazilian coast. The vessel took with her 11,438 long tons of fuel oil and 12 long tons of diesel oil valued at \$1,901,259.07 (A58 and A59). United's loss came to \$10,000,000 (A128).

G. Presentation of United's and Amerada Hess' Claims to the Argentine Republic

Shortly after the loss of HERCULES, the attorneys representing respondents before this Court were retained to investigate the attack. Working independently, both firms came to the same conclusion, viz., that the armed forces of the Argentine Republic had attacked HERCULES, which was at all times a neutral ship exercising its undisputed right of innocent passage on the high seas. Subsequent efforts by both firms to obtain redress from the Argentine government were to no avail. See Affidavit of Douglas R. Burnett, Esq. dated October 2, 1985 (JA77-83); Affidavit of Raymond J. Burke, Jr., Esq. dated October 9, 1985 (JA84-88).

On August 3, 1983, attorneys for Amerada Hess presented a conclusive report on the HERCULES attack and a formal de-

mand for restitution, including supporting documents, to the Argentine government (JA78 and A31-A77). The claim was delivered in person by Amerada Hess attorneys to the First Secretary of the Argentine Embassy in Washington, D.C., Dr. Ortegue (JA78 and A148). The First Secretary stated that the claim would be transmitted to Buenos Aires forthwith (JA78). On September 29, November 4, and November 18, 1983, as well as January 23 and February 8, 1984, Amerada Hess attorneys attempted without success to ascertain Argentina's position (JA78 and A149-A155).

On February 22, 1984, Dr. Ortegue informed Amerada Hess attorneys that the HERCULES claim was being handled jointly by the Ministry of Defense and the Ministry of Foreign Affairs in Buenos Aires. In view of this fact and the recent inauguration of the popularly elected government of President Alfonsín, Dr. Ortegue recommended Argentine counsel be retained to pursue the claim directly with the ministries involved (JA78 and A156).

Amerada Hess immediately retained the distinguished Dr. Jose Domingo Ray, who accepted appointment on the condition that he would be unable to pursue this claim publicly in the Argentine courts (JA78-79, A157-160, and A182). On March 14, 1984, Dr. Ray delivered to the Ministry of Foreign Affairs a copy of the Brazilian Navy inquiry which confirmed the neutral status of HERCULES (JA79 and A82-A130). In mid-April, Dr. Ray delivered a formal statement of the case under international law and a demand for restitution (JA78-79 and A161-A181).

Dr. Ray's efforts at negotiation with the Foreign Ministry failed and on May 24, 1984, the Ministry of Foreign Affairs replied:

To this respect, I inform you that having in mind the nature of this case, the North American law firm of Hill Rivkins Carey Loesberg O'Brien & Mulroy can send all sort of documents, memorandum, etc. to the Argentine Embassy in Washington D.C. which will make them arrive at this legal staff. (JA79).

Dr. Ray informed Amerada Hess, "after the note received, there is no doubt that the attempt remains in a dead way" (JA79 and A183-A186).

Concerned with a two-year statute of limitations in Argentina, Amerada Hess attempted to retain four of the leading law firms

in Argentina to pursue the Amerada Hess claim in the Argentine courts (JA79-82).

The law firm of Abeledo & Gottheil y Asociados declined to accept appointment, stating:

We have studied carefully chances of success of a legal action of recovery in Argentine Courts in that we have reached the conclusion that under the circumstances of fact and applicable precedence the case has almost no probability of a positive outcome.

As a consequence, we would feel uncomfortable defending a case the viability of which we do not see. We regret to tell you that we prefer not to engage in such litigation. (JA79).

The same firm sent an opinion of the National Supreme Court of Justice of Argentina whereby the court held it had no jurisdiction for acts committed by government agencies during the war (A191-A192).

On June 1, 1984, the Argentine law firm of Estudio Beccar Varela declined to represent Amerada Hess (JA80) stating:

Without knowing whether the navigation of the HERCULES in the conflict zone was innocent or not, we may decide if we would consider assisting you in this case, because we are inclined to refrain from acting against our Government in a claim for damages reputedly resulting from war action when hostilities have not yet been brought to an end (JA80).

On June 1, 1984, the Argentine law firm of C&C Beccar Varela agreed to represent Amerada Hess (JA80). The litigation file was transferred immediately from Dr. Ray's office to that firm (JA80). On June 5, 1984, C&C Beccar Varela revoked their acceptance stating:

...we wish to inform you that we have received today afternoon the papers from Edy, Rothe y de la Vega (Dr. Ray) and after carefully reading, we reach the moral conviction that we cannot defend the case. The facts seem to indicate that the vessel was directed by the English fleet. The geographical position is unexplainable except that, the cargo of usable gasoline and not crude, the lack of clear identification of the aircraft that bombed the ship three times and also circumstantial evidence

against the contention of the time charterers, from our personal point of view (JA81).

Additional exchanges with C&C Beccar Varela to convince them to continue representation of Amerada Hess proved futile (JA81-82 and A203-A204). The Argentine firm maintained its position:

As that was not a case for an Argentine, in our opinion, we communicated our negative response. (JA82).

Attorneys for United, who were kept advised of Amerada Hess' efforts to obtain redress from the Argentine Republic, decided to pursue a different avenue by meeting with a senior government official, Dr. Jorge Sabato, Vice-Chancellor of the Ministry of Foreign Affairs and Culture in Buenos Aires on March 27, 1985 (JA85-87). United's attorneys were advised that Dr. Sabato was second in command to the Minister of Foreign Affairs, with responsibility for all matters pertaining to the Falkland Islands/ Islas Malvinas.

In discussing United's claim, Dr. Sabato advised that even if it were shown that the vessel were bombed by Argentine planes (which was denied), he doubted that there existed a "framework" for any kind of settlement, the only "framework" in his opinion being (i) by contract, (ii) by regulation involving war reparations (which were not applicable to the Falkland/Malvinas conflict), or (iii) by judgment of an Argentine court (JA87). Dr. Sabato telephoned his lawyers, who confirmed this view (JA87). Dr. Sabato suggested that United file suit in Argentina, but based upon their own experience, the above-described experience of counsel for Amerada Hess, and the prevailing climate of opinion in Argentina regarding the HERCULES incident (JA88), United attorneys concluded that suit in Argentina on a claim arising from the Falkland/Malvinas conflict would be futile.

Respondents, effectively foreclosed from access to the courts of Argentina, received no response from Argentina to their offers to arbitrate, mediate, negotiate or otherwise resolve the claims.

II. The Rulings of the Courts Below

Unable to obtain so much as a hearing of their claims in Argentina, on June 7, 1985, Amerada Hess and United brought suit

against the petitioner in the United States District Court for the Southern District of New York. Respondents sought damages in tort for the loss of the vessel and bunkers and claimed that Argentina had violated international law in attacking, without cause, the neutral merchant vessel HERCULES on the high seas and, thereafter, in refusing to provide a forum for review of their rights to compensation.

The jurisdiction of the district court was invoked under the Alien Tort Statute, under the general admiralty and maritime jurisdiction, and under the principle of universal jurisdiction recognized in international law. Petitioner moved to dismiss under Fed. R. Civ. P. 12(b)(1) and (2) for lack of subject matter and personal jurisdiction, on the ground that the FSIA was the sole source of jurisdiction in all suits against foreign states and that petitioner was immune from suit under the Act for the violations of international law alleged by Amerasia Hess and United.

The district court dismissed respondents' complaints for lack of subject matter jurisdiction. The court held that "a foreign state is subject to jurisdiction in the courts of this country if, and only if, an FSIA exception empowers the court to hear the case" (Pet. App. 29a). In so holding, the court recognized that its interpretation of the FSIA narrowed the jurisdictional scope encompassed by the plain language of the Alien Tort Statute (Pet. App. 32a). To the district court it was "irrelevant that repeal by implication is disfavored" since, in the court's view, the elimination of a class of defendants under the Alien Tort Statute effected no repeal (Pet. App. 32a-33a). The court ruled that respondents' claims fell outside of "the exceptions to blanket foreign sovereign immunity provided by the FSIA" (Pet. App. 30a), and further found that respondents could "claim no loss whatsoever occurring in the United States" (*ibid*).

The court of appeals reversed, holding that the Alien Tort Statute provides jurisdiction over respondents' claims, and that the FSIA does not bar it (Pet. App. 3a).⁶

The court, in an opinion by Chief Judge Feinberg, initially examined whether the facts alleged by respondents were sufficient to state a violation of international law. Finding that the right of

⁶ Feinberg, C.J., and Oakes, J.; a dissenting opinion was filed by Judge Kearse.

innocent neutral ships to free passage on the high seas was recognized in a series of "international treaties and conventions dating at least as far back as the last century," that "federal courts have long recognized in a variety of contexts that attacking a merchant ship without warning or seizing neutral's goods on the high seas requires restitution", and that the academic literature was similarly "of one voice with regard to a neutral's right of passage," the court concluded that it was "beyond controversy that attacking a neutral ship in international waters, without proper cause for suspicion or investigation, violates international law." (Pet. App. 5a-7a).

The court next determined that respondents' actions met the requirements for federal district court jurisdiction set forth in the Alien Tort Statute. The court held that:

Although seldom employed, the Alien Tort Statute means what it says. If an alien brings a suit, for a tort only, that sufficiently alleges a violation of the law of nations then the district court has jurisdiction. See *Filartiga*, 630 F.2d 876. All of these requirements are met in the instant case. Appellants are aliens; they are Liberian corporations. This suit is for a tort only—the bombing of a ship without justification. Also... the suit alleges a violation of international law. (Pet. App. 7a-8a).

The court rejected petitioner's contention that the Alien Tort Statute could only be invoked against individual defendants. While expressing doubt as to whether absolute sovereign immunity would have governed at the time of its enactment, under the circumstances of this case,⁷ the court held that the jurisdictional grant of the Alien Tort Statute is to be construed according to current standards of international law (Pet. App. 8a-9a).

The court found that modern international law does not extend immunity to states for the small class of actions which are generally accepted by the nations of the world as violations of international law. (Pet. App. 5a, 8a-10a, and 16a). Noting, *inter alia*, such developments in this century as the rejection of sovereign immunity defenses by the Nuremberg tribunal and the emerging international law prohibition of genocide, the court reasoned that,

⁷ The court recognized that "[w]here the attacker has refused to compensate the neutral, such action is akin to piracy, one of the earliest recognized violations of international law" (Pet. App. 7a).

were the result otherwise, "the exception would nearly swallow the rule" and international law, even in theory, would have little meaning (Pet. App. 9a-10a). Having established that the sinking of a neutral vessel on the high seas without justification violates a substantive principle of international law for which there is no immunity, the court sustained jurisdiction over Argentina under the Alien Tort Statute (Pet. App. 10a).

The court rejected petitioner's argument that the jurisdictional grant of the Alien Tort Statute has been preempted by the FSIA. While it stated that the FSIA as a general rule is the sole basis for United States jurisdiction over foreign states, the court found that the act's principal goals—to narrow the scope of immunity respecting the commercial activities of foreign states, to remove immunity decisions from the executive to the judicial branch so as to ensure these decisions were made on purely legal grounds, and to unify the rules of procedure relating to suits against foreign states—did not evince an intent on the part of Congress to extinguish existing remedies in United States courts for violations of international law of the type alleged by respondents (Pet. App. 11a-13a). The court reasoned that it would be-

odd to hold that, by enacting a statute designed to narrow the scope of sovereign immunity in the commercial context, Congress, though silent on the subject, intended to broaden the scope of sovereign immunity for violations of international law. (Pet. App. 12a).

Since Congress had expressed its intent to incorporate standards recognized under international law in its enactment of the FSIA, and moreover had left the Alien Tort Statute untouched, the court held that the FSIA would not bar jurisdiction in the unusual circumstances of this case (Pet. App. 13a). The court found personal jurisdiction over Argentina was proper since, *inter alia*, the act complained of was intentional tortious injury to a vessel plying the United States domestic trade, pursuant to a contract calling for payment in the United States, and the United States government's direct communication to Argentina of its interest in HERCULES' safety was sufficient to put Argentina on notice that it might be sued here. The court was further mindful of considerations of fairness, since respondents had been denied an Argentine forum in which to pursue their claims (Pet. App. 15a).

The court emphasized that its holding was "a narrow one" and that—

[i]t should also be noted that the burden on a plaintiff moving under the Alien Tort Statute remains great. The class of actions that are recognized as international law violations, as distinguished from a mere tort, is quite small. (Pet. App. 16a).

The dissent did not address itself to the meaning of the Alien Tort Statute, or to the question of immunity under international law for the actions complained of by respondents, since it concluded that the FSIA had foreclosed consideration of respondents' claims.

Petitioner's petition for rehearing was unanimously denied by the panel which heard the appeal, and no circuit judge voted in favor of petitioner's suggestion for rehearing *en banc*.

Summary of Argument

The court of appeals properly held that the district court has subject matter jurisdiction over a neutral's claim for loss of its ship and bunkers, where the loss was caused by the unprovoked and illegal attack by a belligerent on the high seas, *and* where, at the time of the attack, the ship was exclusively engaged in the U.S. domestic trade, as provided in 46 U.S.C. § 877, *and* where the belligerent has refused redress and denied even access to a forum in clear violation of international law.

The court of appeals' decision reaffirms ancient principles of the maritime law of nations which predate this country's founding. *American Insurance Co. v. Canter*, 26 U.S. (1 Pet.) 511, 545 (1828) (Marshall, C.J.); *The Lusitania*, 251 F. 715, 732-736 (S.D.N.Y. 1918). These principles are incorporated in art. I, §8, cl.10 and art. III, §2, cl.1 of the U.S. Constitution, which reserve to the admiralty courts all questions of seizure "committed on the high seas and offenses against the Laws of Nations." Under the general maritime law, U.S. admiralty courts have competently exercised this jurisdiction and enforced the neutral shipowner's right to restitution, or compensation, for the illegal seizure or destruction of ships or cargoes on the high seas by the armed forces of sovereign states, *Del Col v. Arnold*, 3 U.S. (3 Dall.) 333 (1796);

Maley v. Shattuck, 19 U.S. (3 Cranch) 458 (1806); *The Amiable Nancy*, 16 U.S. (3 Wheat.) 546 (1818). The intent of Congress in enacting the Alien Tort Statute included ensuring that the right to compensation of an alien shipowner, whose ship and cargo had been illegally destroyed or seized in violation of the law of nations, would be protected in the same manner as that of an American shipowner. This intent is unmistakably reflected in the handwritten notes of the statute's drafter, Oliver Ellsworth, in the historical context and plain language of the statute, and in the early opinions of the judges and the attorney general who interpreted or applied this law when it was newly enacted. *Maxon v. The Brigantine Fanny*, 17 F. Cas. 942, 947-948 (D.Pa. 1793) (No. 9, 895); *Martins v. Ballard*, 16 F. Cas. 923, 924 (D.S.C. 1794) (No. 9, 175); *Jansen v. The Vrow Christina Magdalena*, 13 F.Cas. 356, 358 (D.S.C. 1794) (No. 7, 216), *aff'd sub. nom.*, *Talbot v. Jansen*, 3 U.S. (3 Dall.) 133 (1795); *Bolchos v. Darrell*, 3 F.Cas. 910 (D.S.C. 1795) (No. 1,607); 1 Op. Att'y Gen. 57 (1795).

The right of an innocent neutral shipowner to seek, and receive, compensation for the illegal destruction of its ship and cargo on the high seas has been recognized for centuries under customary international law. Story, *Notes on the Principles and Practices of Prize Courts* (Thomas Pratt, ed; London, 1854); Argentine Provisional Regulation for Privateering of 1817; The London Naval Conference of 1909; Pan-American Convention Relating to Maritime Neutrality, Feb. 20, 1928, 47 Stat. 1989; Geneva Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312.

Petitioner's acts are an indefensible violation of the ancient law of the sea, for which there is no immunity in international law, and for which immunity should be denied in a United States court. *The Santissima Trinidad*, 20 U.S. (7 Wheat.) 283 (1822), *The Prinz Frederick*, 2 Dods. 451 (1820). *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980); Restatement (Third) of The Foreign Relations Law of the United States §404. (1986) (hereinafter Restatement).

The Foreign Sovereign Immunities Act of 1976 (FSIA) does not repeal the Alien Tort Statute of 1789. Repeal by implication is not favored. *United States v. Continental Tuna Corp.*, 425 U.S. 164, 168 (1976). The FSIA was intended to codify existing law, and to limit the immunity to which a foreign state may be entitled for its commercial, or private, acts. In enacting the FSIA, Congress did

not intend *sub silencio* either to repeal the Alien Tort Statute of 1789, or to abridge the general admiralty and maritime jurisdiction of the federal courts. The Alien Tort Statute provides to respondents a "remedy by a civil suit in the courts of the United States", 1 Op. Att'y. Gen. 57, 58 (1795). This remedy is not extinguished, nor are respondents' causes of action barred, by the FSIA. *Von Dardel v. USSR*, 623 F.Supp. 246, 254 (D.D.C. 1985).

In any event, jurisdiction is proper in this case under the FSIA pursuant to §1605 (a)(5), since the tortious act of petitioner took place on waters subject to the jurisdiction of the United States, and the injury suffered by respondents occurred within the territorial United States. Petitioner has also implicitly waived its defense of sovereign immunity under §1605 (a)(1) of the FSIA, by explicitly agreeing to the terms of conventions which protect the right of neutral vessels to innocent passage on the high seas, and mandate the payment of compensation for violation of that right. *Von Dardel v. USSR*, 623 F. Supp. 246, at 255.

The court of appeals applied due process standards under the Fifth Amendment, and determined that the forum in this case is the United States. *Texas Trading and Milling v. Federal Republic of Nigeria*, 647 F.2d 300, 314 (2d Cir. 1981). Petitioner's acts are torts intentionally directed at the forum. In addition to causing the loss of HERCULES and her bunkers, petitioner tortiously disrupted a crude oil transportation and distribution system vital to the economy of the United States. Petitioner was given ample notice of the intended route of HERCULES, a vessel employed in the U.S. domestic trade, prior to the attack. Besides other acts, petitioner's silence in the face of this notice was an act which led respondents to place the vessel in harm's way. In denying access to a forum and refusing compensation to the neutral respondents, petitioner must reasonably have foreseen litigation in the courts of the United States. *Calder v. Jones*, 465 U.S. 783, 789-790 (1984). Petitioner's objection to service of process, raised for the first time in its brief on the merits in this Court, is waived, Fed. R. Civ. P. 12 (h) (1).

POINT I

The Court Of Appeals Properly Found Jurisdiction Under The Alien Tort Statute

As the United States recognizes in its brief *amicus curiae* ("U.S. *amicus*") at p. 9, "[i]t is well settled that the starting point for interpreting a statute is the language of the statute itself", *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 108 S. Ct. 376, 381(1987) (quoting *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, (1980)).

The Alien Tort Statute was enacted nearly two hundred years ago by the First Congress of the United States, as §9(b) of the Judiciary Act of September 24th, 1789, Ch. 20, 1 Stat. 73, 77. Now codified (in virtually identical form) at 28 U.S.C. §1350 (1982), it provides:

§1350. Alien's action for tort. .

The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

Although no legislative history of the original provision survives, there is every indication that it was drafted as part of the original grant of admiralty jurisdiction in the Judiciary Act of 1789.

The handwritten notes of Oliver Ellsworth,⁷ the "acknowledged author" (Pet. Br. at 31), transcribe as follows:

And shall also have exclusive original cognizance of the simple causes of admiralty and maritime jurisdiction in all seizures under laws of impost navigation or trade of the United States where the seizures are made on waters navigable from the sea by vessels of 10 or more tons burthen, within their respective

⁷ Senator from Connecticut, member of the Marine Committee, creator of the Committee of Appeals in Cases of Capture of the First Continental Congress, the predecessor of the U.S. Supreme Court and the first federal court, Chairman of the Senate Judiciary committee which drafted the Judiciary Act of 1789, and Chief Justice of the U.S. Supreme Court from 1796 through 1800, Brown, *The Life of Oliver Ellsworth* (MacMillan Corporation,) 1905, pgs. 184-186.

districts as well as upon the high seas—saving to suitors in all cases the right of a common law remedy where the common law is competent to give it, and it shall also have cognizance, concurrent with the courts of the Federal States, or the Circuit Courts, as the case may be, of all causes where a foreigner sues for a tort only in violation of the Law of the Nations or a treaty of the United States (JA 121).

A copy of these notes, reproduced from the originals by the National Archives, is contained in the Joint Appendix at JA112-121.

The wording and punctuation of the language quoted above clearly demonstrate that the Alien Tort Statute was intended to be part of the general grant of admiralty jurisdiction in the Judiciary Act of 1789⁸ (now codified at 28 U.S.C. §1333 (1982)); it is only with time and successive recodification that these two provisions have been separated in the United States Code.

In the words of Oliver Ellsworth, the jurisdictional grant in §9 of the Judiciary Act covered "admiralty cases, smaller offenses and some other special cases." Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49, 60 (1923). Without doubt, one of these special cases was the provision contained in the Alien Tort Statute. In other words, §9 gave aliens who were victims of "tort[s], in violation of the Law of Nations" a remedy which clearly supplemented maritime torts cognizable in admiralty jurisdiction under the U.S. Const. art. III, §2, cl. 1. Since torts in violation of the law of nations at that time were in large part captures at sea by privateers or by public armed ships, pursuant to the law of belligerent prize, the Alien Tort Statute was certainly meant to assure a forum for these "special cases".

According to Blackstone, author of the leading law text of that era,⁹ the "law of nations" consisted not of rules governing sovereign states in their relations with each other, but of rules of natu-

⁸ The Draft Bill of the Act as published in the Boston Gazette on June 29, 1789, and July 6, 1789, further supports this conclusion (A458-A459).

⁹ The first American edition of the work was printed in 1771 or 1772, and a copy with Ellsworth's name and the date 1774 on the fly-leaf was still in existence as late as 1905. Brown, *The Life of Oliver Ellsworth*, *supra* n. 7, at p. 26.

ral law—applicable to states and individuals alike—which were presumed to be identical in all states:

The law of nations is a system of rules deducible by natural reason, and established by universal consent among the civilized inhabitants of the world, in order to decide all disputes, to regulate all ceremonies and civilities, and to insure the observance of Justice and good faith in that intercourse that must frequently occur *between two or more independent states and the individuals belonging to each . . . as none of these States will allow a superiority in the other, therefore neither can dictate or prescribe the rules of this law to the rest; but such rules must necessarily result from those principles of natural justice in which all the learned of every nation agree. . . .*

3 Blackstone, *Commentaries on the Laws of England*, 66, 67 (American Ed., Worcester, Mass., 1790) (emphasis supplied) (A463).

Blackstone continued, defining the civilly actionable portions of the law of nations:

Thus. . . in all marine causes. . . the law merchant, which is a branch of the law of nations, is regularly and constantly adhered to. So too, in all disputes relating to prizes, to shipwrecks, to hostages, and to ransom bills, there is no other rule of decision but this great universal law collected from history and usage, and such writers of all nations and languages as are generally approved and allowed of. *Id.* at 67. (A463).

“[P]rizes, hostages and ransom bills” belong, in modern analogy, to that branch of the laws of war relating to individual claimants.¹⁰

As principal offenses against the law of nations, Blackstone listed violation of safe-conducts, infringement of the rights of ambassadors and piracy. The first of these he defined to include precisely petitioner’s conduct in this case:

I. . . violations of safe-conducts or passports, expressly granted by the king or his ambassadors [sic] to the subjects of a foreign

¹⁰ Petitioner has “no quarrel with [respondents’] contention that prize courts, though sitting as municipal courts, applied generally recognized rules of international law”, Defendant’s Response to Plaintiff’s Joint Memorandum of Law in Opposition to Defendant’s Motion to Dismiss, at 15.

power in time of mutual war; or committing acts of hostility against such as are in amity, league, or truce with us, who are here under a general implied safe-conduct; these are breaches of the public faith, without the preservation of which there can be no intercourse or commerce between one nation and another. . . (emphasis in second clause supplied). *Id.* at 68.

The unjustified attack on a neutral vessel on the high seas, after notice of its route of innocent passage, is certainly the violation of an implied safe conduct and one of the oldest recognized offenses against the law of nations. Since only sovereigns possessed navies and commissioned privateers, they must have been regarded as logical defendants under the Alien Tort Statute.

It was said of the pirate that he was *hostis humani generis* — “the enemy of all mankind” — and that by his “declaring war against all mankind, all mankind must declare war against him.” Blackstone, at 71 (A465). Piracy, thus, was an “offense against the universal law of society” (*ibid.*). As the court of appeals recognized, “where the attacker has refused to compensate the neutral, such action is analogous to piracy, one of the oldest recognized violations of international law” (Pet. App. 7a).¹¹

All early recorded cases in which the Alien Tort Statute appears involve maritime claims. *Bolchos v. Darrell*, 3 F. Cas. 910 (D.S.C. 1795) (No. 1,607); *Maxon v. The Brigantine Fanny*, 17 F.

¹¹ Piracy fits the maritime context of the sentence in which the Alien Tort Statute was originally contained. The words “civil causes of admiralty and maritime jurisdiction,” however, which come before the Alien Tort Statute wording in the drafter’s notes, already encompassed piracy as a matter of common usage in 1789. Blackstone notes at 71 that the pirate was recognized as the enemy of mankind, punished by anyone and anywhere (A465). The last Royal Commission as a judge of the Maryland Court of Vice-Admiralty, dated November 27, 1775, lists the jurisdiction of the Admiralty Court as including offenses by “Traitors Pyrates Manslayers Felons and Fugitives” (JA 105). Therefore, there would seem to be no purpose in adding “in violation of the law of nations” solely to include piracy, which the drafter would have understood to be included in the wording “admiralty and maritime jurisdiction.” This point is underscored by the enactment, eight months after the Alien Tort Statute was passed, of a specific piracy statute by Congress on April 30, 1790 (1 Stats. at Large 113). Had the Alien Tort Statute dealt solely with piracy, it would have been logical for Congress to repeal, modify, or refer to the Alien Tort Statute in the later piracy statute.

Cas. 942, 947-948, (D. Pa. 1793)(No. 9,895).¹² See also *Jansen v. The Vrow Christina Magdalena*, 13 F. Cas. 356, 358 (D.S.C. 1794) (No. 7,216), *aff'd sub nom., Talbot v. Jansen*, 3 U.S. (3 Dall.) 133 (1795); *Martins v. Ballard*, 16 F. Cas. 923, 924 (D.S.C. 1794) (No. 9,175).

The United States' contention that the Alien Tort Statute is merely jurisdictional and does not provide a cause of action (U.S. *amicus* at 27-28, n. 26) is not well founded. An opinion of Attorney General William Bradford, published in 1795, addressed the civil and criminal liability of United States citizens accused of violating a treaty, as well as the law of nations, by "aid[ing] and abett[ing] a French fleet in attacking a [foreign] settlement, and plundering or destroying the property of British citizens, on that Coast." 1 Op. Att'y. Gen. 57, 58 (1795) (A353-355). After noting that, while "transactions . . . [taking] place in a foreign country. . . are not within the cognizance of our courts", "the high seas are within the jurisdiction of the district and circuit courts of the United States" (emphasis in original), the opinion finds that—

. . . there can be no doubt that the company or individuals who have been injured by these acts of hostility [on the high seas] have a *remedy* by a *civil* suit in the courts of the United States; jurisdiction being expressly given to these courts in all cases where an alien sues for a tort only, in violation of the laws of nations, or a treaty of the United States. . . (The emphasis on "remedy" is supplied). (Ibid.)¹³

The plain language of the Alien Tort Statute embraces state, as well as individual defendants—states were principal subjects of

¹² In *Moxon*, the court dismissed for lack of jurisdiction as the suit was for a marine trespass, which it did not deem to be a tort in violation of the law of nations; jurisdiction was sustained in *Bolchos*, a case sounding in prize, and the seizure of neutral "property" on board an enemy vessel on the high seas in time of war was decreed permissible prize, due to a treaty which varied the otherwise applicable rules of the law of nations.

¹³ See also 26 Op. Att'y Gen. 250, 252 (1907) (the Alien Tort Statute "provide[s] a right of action and a forum" for injuries suffered by citizens of Mexico in a boundary dispute involving diversion of the Rio Grande river) (emphasis supplied) (A367-371).

the law of nations,¹⁴ and treaties are agreements to which, by definition, states are party.¹⁵ That this is so is underscored by the early cases in which the statute appears, which apply the law of nations and draw on principles of prize.

Seizures as prize were "acta jure imperii", adjudged according to the maritime law of nations. This is nowhere better stated than in *The Zamora*, [1916] 2 A.C. 77, 79:

[A]ll those matters upon which the (Prize) Court is authorized to proceed are, or arise out of, acts done by the sovereign power in right of war. It follows that the King must, directly or indirectly, be a party to all proceedings in a Court of Prize. In such a Court his position is in fact the same as in the ordinary Courts of the realm upon a petition of right which has been duly filed. Rights based on sovereignty are waived and the Crown for most purposes accepts the position of an ordinary litigant. A Prize Court must of course deal judicially with all questions which come before it for determination, and it would be impossible for it to act judicially if it were bound to take its orders from one of the parties to the proceedings. (emphasis added.)

Respondents stress that prize jurisdiction and *in rem* jurisdiction are separate, although frequently both are present in a prize case. It is the act of seizure on the high seas, not the presence of the ship, which triggers prize jurisdiction. Cases involving prize jurisdiction where vessels were sunk and not present *in rem* include *The Amiable Nancy*, 16 U.S. (3 Wheat.) 546 (1818) and *Del Col. v. Arnold*, 3 U.S. (3 Dall.) 333 (1796). See also the Affidavit of British counsel in support of respondents, at JA89-96.

As Justice Story wrote:

. . . if the prize be lost at sea, the court may, nevertheless, proceed to adjudication, either at the instance of the captors, or of the claimants; so, although the property may actually be lying within a foreign neutral territory, the Court may proceed to adjudication. Story, *Notes on the Principles and Practices of Prize Courts* (1854) at 29.

¹⁴ See Dickinson, *The Law of Nations as Part of the National Law of the United States*, 101 U. Pa. L. Rev. 26, 26-29 (1952).

¹⁵ See, e.g., Restatement § 301.

Thus, in such prize cases, the court had authority to proceed in *personam*, *id.* at 110.

The prevalence of eighteenth and nineteenth century prize courts, open to claimants in belligerent or "captor" states, accounts for the difficulty in locating authority precisely on point with this case¹⁶, and the abolition of privateering by the Declaration of Paris of 1856 (A253) may well explain later judicial inactivity under the Alien Tort Statute.

In 1980, the court of appeals, in a landmark decision on the Alien Tort Statute, echoed the natural law reasoning of the era in which it was passed. In *Filartiga v. Pena-Irala*, 630 F. 2d 876 (2d Cir. 1980), the court examined a claim of deliberate torture, committed under color of government authority by a Paraguayan official against a Paraguayan citizen, *within the borders of that country*. Finding that "courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today"¹⁷, the court held that the torturer had become, like the eighteenth-century pirate, *hostis humani generis*—an enemy of all mankind, subject to the jurisdiction of all courts—and sustained jurisdiction under the Alien Tort Statute.

Respondents' claims are well within the reasoning of the *Filartiga* court.¹⁸ Indeed, the United States in a memorandum to that court, which it now seeks to discredit, correctly argued that—

... it has long been established that in certain situations, individuals may sue to enforce their rights under international law. For example, when a ship is seized on the high seas in violation of

¹⁶ But see *The Prinz Frederick*, 1 Dods. 451, 484 (1820) (salvage) ("it is not till after [the] denial of justice that recourse should be had elsewhere") (A575).

¹⁷ A conclusion with which the United States agreed in that case, Memorandum for the United States as *Amicus Curiae* in *Filartiga v. Pena-Irala*, 630 F. 2d 876 (2d Cir. 1980) reprinted in 19 I.L.M. 585, 588 (1980) ("[s]ince the law of nations had developed . . . by . . . customary practice, the framers of the First Judiciary Act surely anticipated that international law would not be static after 1789").

¹⁸ In *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1540 (N.D. Cal. 1988) it was recently held that "private torture will not normally implicate the law of nations since there is . . . no international consensus as to non-state actors . . . however . . . torture committed by state officials . . . [would] fall within . . . *Filartiga*".

international law, the owner of the ship may sue to recover the ship as well as seek damages . . .¹⁹ (emphasis added).

"Principal subjects of admiralty jurisdiction are . . . maritime torts, including captures *jure belli*", *The Belfast v. Boon*, 74 U.S. (7 Wall.) 624, 637 (1868). Matters of prize necessarily involve review, by courts in admiralty, of the conduct of military forces. See *Jecker v. Montgomery*, 54 U.S. (13 How.) 498 (1851); *Maley v. Shattuck*, 1 U.S. (3 Cranch) 458 (1806). Foreign sovereign immunity, where applicable, was not a rule of law but a question of comity. *The Santissima Trinidad*, 20 U.S. (7 Wheat.) 283 (1822).

Under the narrowest of all interpretations—reading "violation of the law of nations" to encompass only those violations recognized in 1789²⁰—the district court has jurisdiction to hear respondents' claims.

Of the cases petitioner cites which have presented the question of jurisdiction over a foreign state defendant under the Alien Tort Statute,²¹ only *Von Dardel* is similar in that the violation alleged (infringement of the rights of ambassadors) was also recognized in 1789. However, each of these cases allege violations of international law taking place *within* the territory of foreign countries; as such, they call into question the act of state doctrine, an issue not present in this case. Where the violation occurs on the high seas, there is no question that federal courts have jurisdiction.²²

The decision of the court of appeals should be affirmed, and respondents' causes of action allowed to proceed.

¹⁹ *Supra*, n. 17, 19 I.L.M. at 602.

²⁰ See *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 813 (D.C.Cir. 1984), *cert. denied* 470 U.S. 1003 (1985).

²¹ *Von Dardel v. USSR*, 623 F. Supp. 246 (D.D.C. 1985); *Siderman v. Republic of Argentina* No. CV 82-1772-RMT (C.D. Cal., March 7, 1985) *appeal pending*, (9th Cir. No. 85-5773); *In re Korean Airlines Disaster of September 1, 1983*, 597 F. Supp. 613 (D.D.C. 1984).

²² 1 Op. Atty. Gen., *supra* at 58; See *Bernhard v. Creene*, 3 F. Cas 279 (D.C.Ore. 1874) (No. 1, 349); *Patch v. Marshall*, 18 F. Cas. 1288 (C.C.D. Mass. 1853) (No. 10, 793); see *The Belgenland*, 114 U.S. 355 (1884).

POINT II

The Right Of An Innocent Neutral Vessel At Sea To Be Free From Unprovoked Attack, And To Seek, And Receive, Compensation For Violation Of That Right Is A Universally Accepted Rule Of Law

The right of a neutral merchant vessel to innocent passage on the high seas, and the obligation of belligerent states to entertain claims for losses suffered by violation of that right, are "by the general consent of the civilized nations of the world, and independently of any express treaty or other public act . . . established rule[s] of international law". *The Paquete Habana*, 175 U.S. 677, 708 (1900). There is no question that destruction of an innocent merchant vessel, without cause or provocation, mandates compensation of ship and cargo.

Customary international law "may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law", *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160-161 (1820). International law protecting the safety of neutral merchant vessels in time of war, as reflected in the regulations and practices of nations, is traced in *The Lusitania*, 215 F. 715, 732-736 (1918), beginning with the year 1512. Indeed, the inviolability of neutral ships and cargoes has been traced by the Argentine scholar and diplomat Charles Calvo as far back as the thirteenth century.²³

The rights of neutrals generally to compensation were established as long ago as the Roman era. In his seminal work, *The Law of War and Peace*, Grotius, in Chapter XVII entitled "On Those Who Are of Neither Side In War" wrote:

I. *From those who are at peace nothing should be taken except in case of extreme necessity, and subject to the restoration of its value*

It might seem superfluous for us to speak of those who are not involved in war, since it is quite clear that no right of war is valid against them [T]he necessity which gives any right over another's property must be extreme; furthermore, that it is

²³Calvo, *Le Droit International Theorique et Pratique* (Paris 1888), at 300 (translated at A524).

requisite that the owner himself should not be confronted with an equal necessity; that even in case there is no doubt as to the necessity more is not to be taken than the necessity demands; that is, if retention is sufficient, then the use of a thing is not to be assumed; if the use is sufficient, then not the consumption; if consumption is necessary, the value of the thing must then be repaid.

Grotius, *The Law of War and Peace*, Book III, chap. XVII, para. I, reprinted in 2 *Classics of International Law* 783 (James Brown Scott, ed.) (Clarendon Press, 1925). Grotius then cites examples of restitution for damage to crops and foodstuffs of neutrals during the campaigns of Sulla, Pompey [sic] and Domitian, *id.* at 784.

A scholarly and complete treatment of the international law applied by English prize courts in 1789, and the rights accorded neutral merchant vessels at that time, is contained in the Affidavit of British counsel in support of respondents (JA89) and will not be repeated here. The principles embodied in these decisions were adopted and applied by American courts, even before the existence of this nation;²⁴ undoubtedly they were well known to the framers of the Judiciary Act and to the drafter of the Alien Tort Statute.

The law of that era respecting destruction of a neutral vessel was well stated by Lord Stowell, England's greatest admiralty judge:

Where it is neutral, *the act of destruction cannot be justified to the neutral owner, by the gravest importance of such an act to the public service of the Captor's own state; to the neutral it can only be justified, under any such circumstances, by full restitution in value.* (Emphasis supplied.) *The Felicity*, 2 Dods. 381, 386 (1820) (A358).

²⁴See Roth, *The Massachusetts Vice-Admiralty Court and the Federal Admiralty Jurisdiction*, 6 Am. J. of Leg. History 347, 367; F. Wiswall, *The Development of Admiralty Jurisdiction and Practice since 1800* (1970); Gilmore & Black, *The Law of Admiralty*, 44 (1975); Robertson, *Admiralty and Federalism*, Chapter IV, (1970); Story, *Notes on the Principles and Practice of Prize Courts*, 1-11 (Thomas Pratt, ed.; London, 1854) (A231 and A349-352); Royal Commission as Judge of the Maryland Court of Vice-Admiralty (JA105).

Liability for wrongful destruction of a neutral vessel is founded on liability for wrongful capture.²⁶ The capture of a merchant vessel in time of war must be made in accordance with the general principles of visit and search, and the duty to safeguard life, long recognized in international law. Where capture of a neutral vessel is found to be invalid, even though the act of destruction is itself held justifiable, compensation must be paid to injured parties.²⁶

As to the obligation of the court in adjudicating matters of capture or prize, Lord Stowell said:

[T]he duty of my station calls . . . me . . . to consider myself as stationed here, not to deliver occasional and shifting opinions to serve present purposes of particular national interest, but to administer with indifference that justice which the Law of Nations holds out, without distinction, to independent states, some happening to be neutral and some to be belligerent. *The Maria*, 1 C. Rob. at 340, 349 (1799) (A375).

The birth of the United States in an era of naval strife, and against the background of English restrictions on American trade, resulted in a profound commitment to the ideas of freedom

²⁶ An excellent discussion of this point is contained in Sanders, *The Destruction of Prizes at Sea*, U.S. Naval Institute Proceedings (1935) (A387); see also Story, *Notes on the Principles and Practice of Prize Courts* pp. 3-4; Smith, *Part II Neutral Merchantmen—The Destruction of Merchant Ships Under International Law* (A433); *The Law of Naval Warfare* (A400).

²⁸ The universal obligation to abide by these rules, and to honor restitution or compensation claims by neutral vessels, is reflected as well in the usage and practice of nations. For example, Argentina has demanded and received compensation from Germany for the sinking of neutral merchant ships on the high seas by U-boats, *New York Times*, August 24, 1917, p. 1., and Scheina, *Latin America. A Naval History 1810-1987* (1987), pp. 101-102; in *The I'm Alone* (Canada v. United States), 3 U.N. Rep. Int. Arb. Awards 1609, 1618 (1933) (A529), American and Canadian Claims Commissioners recommended, in addition to compensatory damages, payment of \$25,000 by the United States to Canada as a "material amend" for the unjustified intentional sinking of a Canadian vessel (A540); and see the numerous examples cited at p. 10, n. 12 of respondents' joint brief in opposition to the petition for certiorari.

of navigation and commerce.²⁷ The principles and sense of obligation expressed by Lord Stowell were strengthened and expanded in American courts, which "construe[d] the jurisdiction of the admiralty upon enlarged and liberal principles", *DeLovio v. Boit*, 79 F. Cas. 418, 441 (C.C.D. Mass. 1815) (No. 3,776).²⁸

Relief for capture or destruction of a neutral vessel is sought from the sovereign interest, not by diplomatic means through the flag state of the vessel aggrieved, but by trial in the admiralty court. The law of nations imposes a duty on the belligerent power to provide access to its prize courts for the adjudication of such claims. In the words of Justice Story:

By the maritime law of nations, universally and immemorially received, there is an established method of determination whether the capture be, or be not, lawful prize.

Before the ship, or goods, can be disposed of by the captors, *there must be a regular judicial proceeding, wherein both parties may be heard; and condemnation thereupon as prize, in a Court of Admiralty, judging by the law of nations and treaties.*

The proper and regular court, for these condemnations, is the court of that State to whom the captor belongs.

Story, *Notes on the Principles and Practices of Prize Courts* (Thomas Pratt, ed.; London, 1854) (Emphasis supplied.)

It has been said that these rules of custom are "so clear in principle, and established in practice, that they require neither reasoning nor precedent to illustrate or support them", *The Felicity*, 2

²⁷ See A. Rappaport, "Freedom of the Seas", 2 *Encyclopedia of American Foreign Policy* 397; R. Bartlett, "Neutrality", 2 *Encyclopedia of Foreign Affairs* 680 (1973).

²⁸ In a letter to Lord Stowell acknowledging the present of a copy of some of his judgements, Justice Story wrote:

In the excitement caused by the hostilities then raging between our countries, I frequently impugned your judgements and considered them as severe and partial, but on a calm review of your decisions after a lapse of years, *I am bound to confess my entire conviction both of their accuracy and equity. I have taken care that they shall form the basis of the maritime law of the United States*, and I have no hesitation in saying that they ought to do so in that of every civilized country in the world. (Emphasis supplied.) Holdsworth, *A History of English Law*, VI. XIII at 679.

Dods. 381 (1820). It will suffice for respondents here to refer to the major codifications in this century.²⁹

The London Naval Conference of 1909 provides:

Article 48. *A neutral vessel which has been captured may not be destroyed by the captor: she must be taken into such port as is proper for the determination there of all questions concerning the validity of the capture.*

• • • • •

Article 50. *Before the vessel is destroyed all persons on board must be placed in safety, and all ship's papers and other documents which the parties interested consider relevant for the purpose of deciding on the validity of the capture must be taken on board the warship.*

Article 51. *A captor who has destroyed a neutral vessel must, prior to any decision respecting the validity of the capture, establish that he only acted in the face of an exceptional necessity of the nature contemplated in article 49. If he fails to do this he must compensate the parties interested and no examination shall be made of the question of whether the capture was valid or not.*

Article 52. *If the capture of a neutral vessel is subsequently held to be invalid, though the act of destruction has been held to have been justifiable, the captor must pay compensation to the parties interested in place of the restitution to which they would have been entitled.*

²⁹The United States' argument (U.S. *amicus* at p.4, n.4) that the Geneva Convention on the High Seas of 1958, and the United Nations Law of the Sea Convention of 1982 are "oriented toward peacetime" — is untenable. Since the execution of the United Nations Charter in 1945, which was intended to outlaw war, it has become questionable whether there now exists such a thing as a legal state of war under international law. International agreements drafted since that time often presume its illegality, and hence do not reflect "wartime" orientation. See Restatement §711, comment (h); *The Marianna Flora*, 24 U.S. (11 Wheat.) 1, 42 (1826) ("the right of visitation and search. . . is strictly a belligerent right, allowed by the general consent of nations in time of war").

Article 53. *If neutral goods not liable to condemnation have been destroyed with the vessel, the owner of such goods is entitled to compensation.*

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Article 64. *If the capture of a vessel or of goods is not upheld by the prize court, or if the prize is released without any judgment being given, the parties interested have the right to compensation, unless there were good reasons for capturing the vessel or goods. (Emphasis supplied) (A285-A288).*

The Pan-American Convention Relating to Maritime Neutrality, Feb. 20, 1928, 47 Stat. 1989, to which petitioner is signatory, provides:

Article 1. The following rules shall govern commerce in time of war:

1. *War-ships of the belligerents have the right to stop and visit on the high seas and in territorial waters that are not neutral any merchant ship with the object of ascertaining its character and nationality and of verifying whether it conveys cargo prohibited by international law or has committed any violation of blockade. If the merchant ship does not heed the signal to stop, it may be pursued by the warship and stopped by force; outside of such a case the ship cannot be attacked unless, after being hailed, it fails to observe the instructions given it.*

The ship shall not be rendered incapable of navigation before the crew and passengers have been placed in safety.

• • • • •

Article 27. A belligerent shall indemnify the damage caused by its violation of the foregoing provisions. It shall likewise be responsible for the acts of persons who may belong to its armed forces. (Emphasis added) (A292).

The Geneva Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312 ("Geneva Convention") — which has been adopted by the United States, and to which petitioner is signatory — again restates these principles, and further reflects their establishment as applicable to action by aircraft:

Article 1. The term 'high seas' means all parts of the sea that are not in the territorial sea or in the internal waters of a State (A319).

Article 2. The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty. Freedom of the high seas is exercised under the conditions laid down by these articles and by the other rules of international law. It comprises, inter alia, both for coastal and non-coastal States:

- (1) Freedom of navigation;
- (2) Freedom of fishing;
- (3) Freedom to lay submarine cable and pipelines;
- (4) Freedom to fly over the high seas.

These freedoms, and others which are recognized by the general principles of international law, shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas.

• • • • •

Article 22. 1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters a foreign merchant ship on the high seas is not justified in boarding her unless there is reasonable ground for suspecting:

- (a) That the ship is engaged in piracy; or
- (b) That the ship is engaged in slave trade; or
- (c) That, though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.

2. In the case provided for in sub-paragraphs (a), (b), and (c) above, the warship may proceed to verify the ship's right to fly its flag. To this end, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship, which must be carried out with all possible consideration.

3. If the suspicions prove to be unfounded, and provided that the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained. (A322).

Article 23.

• • • • •

5. Where hot pursuit is effected by an aircraft: ³⁰

(a) The provisions of paragraphs 1 to 3 of the present article shall apply *mutatis mutandis*;

(b) The aircraft giving the order to stop must itself actively pursue the ship until a ship or aircraft of the coastal State, summoned by the aircraft, arrives to take over the pursuit, unless the aircraft itself is able to arrest the ship. It does not suffice to justify an arrest on the high seas that the ship was merely sighted by the aircraft as an offender or suspected offender, if it was not both ordered to stop and pursued by aircraft itself or other aircraft or ships which continue the pursuit without interruption.

• • • • •

7. Where a ship has been stopped or arrested on the high seas in circumstances which do not justify the exercise of the right of hot pursuit, it shall be compensated for any loss or damage that may have been thereby sustained. (Emphasis supplied) (A322-A323).

Articles 110 and 111 of the 1982 United Nations Law of the Sea Convention ("LOS") incorporate almost verbatim the above provisions of the Geneva Convention, with minor changes in language to make clear, for example, in Article 110, *Right of Visit*:

4. These provisions shall apply *mutatis mutandis* to military aircraft. (A334).

Finally, the choice of words in Articles 22.3 and 23.7 of the Geneva Convention (repeated exactly in Articles 110 and 111 of LOS)—which provide that where a vessel is unjustifiably damaged or destroyed "*it shall be compensated*"—is significant. In contrast, for example, Article 106 of LOS as to unjustified seizure for piracy provides that:

Where the seizure of a ship or aircraft on suspicion of piracy has been effected without adequate grounds, *the State making*

³⁰Article 23.1 provides that 'hot pursuit' "must be commenced when the foreign ship or one of its boats is within the internal waters or the territorial sea or the contiguous zone of the pursuing state. . ." (*ibid.*)

the seizure shall be liable to the State the nationality of which is possessed by the ship or aircraft for any loss or damage caused by the seizure. (Emphasis supplied) (A333).

Thus, it is clear that the rules codified in both these conventions relating to 'claims such as respondents' speak to a private right of compensation from the state.

To borrow this Court's words in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 429 (1964), "[t]here are few, if any issues in international law today on which opinion . . . [is] so . . . [united]" as the right of an innocent neutral vessel at sea to be free from unprovoked violence, and to seek, and receive, compensation for the indefensible violation of that right.

POINT III

The Court Of Appeals Correctly Found There Is No Immunity In This Case

In *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 429 (1964), this Court declined to rule on the validity of a Cuban government expropriation of foreign corporate assets, made within the territory of Cuba, because it found that there were "few if any issues in international law" as divisive as the limitations on a state's power to expropriate alien property. Although it therefore did not reach the question of immunity where the act of a foreign state violates universally accepted principles, the Court stressed that "the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it", *id.* at 428.³¹

International consensus is the philosophical underpinning of the eighteenth-century law of nations, conceived of as "this great universal law collected from history and usage, and such writers

³¹ The question was addressed in the lower courts, which held that immunity would not shield clear violations. *Banco Nacional de Cuba v. Sabbatino*, 307 F. 2d 845, 860 (2d Cir. 1962) ("national sovereignty is not absolute but is limited, where the international law impinges, by the dictates of this international law"); *Banco Nacional de Cuba v. Sabbatino*, 193 F. Supp. 375, 381-82 (S.D.N.Y. 1961) ("[t]here is an end to the right of national sovereignty when the sovereign's acts impinge on international law").

of all nations and languages as are generally approved and allowed",³² and traditionally administered in admiralty by the domestic courts of different countries. The jurisprudential concept of a universal law of nations is implicit in the Alien Tort Statute of 1789. In the twentieth century, it finds expression in the principle of universal jurisdiction, set forth in §404 of the Restatement:

§404. Universal Jurisdiction to Define and Punish Certain Offenses

A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism, *even where none of the bases of jurisdiction* [to prescribe] *indicated in §402 is present.* (Emphasis supplied).

The Comments make clear:

a. *Expanding class of universal offenses.* This section, and the corresponding section concerning jurisdiction to adjudicate, §423, recognize that international law permits any state to apply its laws to punish certain offenses although the state has no links of territory with the offense, or of nationality with the offender (or even the victim). Universal jurisdiction over the specified offenses is a result of universal condemnation of those activities and general interest in cooperating to suppress them, as reflected in widely-accepted international agreements and resolutions of international organizations. These offenses are subject to universal jurisdiction as a matter of customary law. . . .

b. *Universal jurisdiction not limited to criminal law.* In general, jurisdiction on the basis of universal interests has been exercised in the form of criminal law, but international law does not preclude the application of non-criminal law on this basis, for example, by providing a remedy in tort or restitution for victims of piracy. (Emphasis in text supplied).

³² Blackstone, *Commentaries on the Laws of England* 66, 67 (American Ed., Worcester, Mass., 1790).

Petitioner's reliance on §402 of the Restatement, entitled "Bases of Jurisdiction to Prescribe", is misplaced. Clearly §404 provides the appropriate basis of jurisdiction in this case.³³

The rationale underlying the progressive limitation of the concept of sovereign immunity, and the relationship between the concepts of sovereign immunity and universal jurisdiction, has been explained, in terms of the development of international human rights law, as follows:

As the international consensus condemning certain behavior becomes universal, the inertial force of the prohibitory norm of non-intervention diminishes correspondingly. The non-intervention principle will thus pre-empt international prohibitions of human rights violations only when the prohibited conduct is either not a concern of states collectively or is defensible as an expression of legitimate political diversity. . . . J. Blum & R. Steinhardt, Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after Filartiga v. Pena-

³³ Petitioner's argument that recognition of respondents' causes of action would violate international rules of jurisdictional competence is without merit. §404 expressly states that it is not limited to the bases of jurisdiction to prescribe contained in §402 (which nonetheless would indicate jurisdiction here under subsection (1)(c)). By definition, adjudications based on established principles of international law are not prescriptive, but constitute the application of standards already binding on all jurisdictions. Jurisdiction to prescribe is defined, in § 401 (a), as the capacity of a state "to make its law applicable. . . ." (emphasis supplied). Respondents here seek application by the courts of the United States of the *law of nations*, as the appearance below of the Republic of Liberia underscores. Moreover, the International Court of Justice has recognized that "United States courts are competent to apply international law in their decisions", *Interhandel Case (Switzerland v. United States)* [1959] I.C.J. Rep. 4, 28.

The article cited by petitioner, *Abandoning Restrictive Sovereign Immunity: Analysis in Terms of Jurisdiction to Prescribe*, 26 Harv. J. Int'l Law 1 49-61 (1985) recognizes the applicability of universal jurisdiction to clear rules of international law, but classifies it as "concurrent prescriptive jurisdiction". The term is particularly apposite in the case of maritime torts on the high seas, which are "the common property of all nations", *The Adventure*, 1 F. Cas. 202 (C.C.D.Va. 1812) (No., 93), *rev'd on other grounds*, 12 U.S. (8 Cranch) 221 (1814). Indeed, the author suggests that—

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Irala, 22 Harv. Int'l. L.J. 53, 77 (1981) ("Blum & Steinhardt"). (Emphasis added).

While the emergence of universal "norms" of human rights in international law is a relatively recent development, the right of neutral vessels to be free from unprovoked attack on the high seas—which are *communis juris*³⁴—has been the subject of international consensus since well before the existence of this country (*supra*, Point II). The admiralty courts of individual nations have for centuries applied a universal maritime law—including the law of belligerent prize—under which the rights of individual claimants, as against the sovereign interest, are determined according to the laws of war.³⁵

The very existence of prize courts, which rendered judgment on "acts done by the sovereign power in right of war" at sea,³⁶ and upheld the right to compensation where a neutral vessel was damaged or destroyed in violation of international law—in breach of the laws of war—demonstrates an early shared expectation among nations that no immunity attaches in such cases. See Affidavit of Anthony Peter Clarke, Q.C. and Nigel Robert Jacobs, dated September 27, 1985 (JA89); and Affidavit of Dr. Ved P. Nanda dated October 9, 1985 (JA97).

The rules of international law have undergone a profound evolution in the twentieth century, and the rejection of former absolutist notions of sovereign immunity has been one of the most

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there would be no reason to grant sovereign immunity to a foreign sovereign when the law of the forum is in full harmony with international law on the particular issue raised. It would be hard to find any affront to the independence, equality, and dignity of a sovereign in subjecting it to a municipal law whose requirements reflect a clear international standard. *Id.* at 55.

³⁴ See *Lord v. Goodall, Nelson & Perkins Steamship Company*, 102 U.S. (12 Otto.) 544 (1880); *Bernhard v. Creene*, 3 F. Cas. 279 (D.C.D. Ore. 1874) (No. 1, 349).

³⁵ In *What Does Tel Oren Tell Lawyers?*, 79 Am. J. Int'l Law 92 (1985), a debate between two scholars of diametrically opposed views produced agreement on only this point.

³⁶ *The Zamora*, [1916] 2 A.C. 77, 91.

significant developments.³⁷ As the court of appeals observed in *Filartiga v. Pena-Irala*, 630 F. 2d 876, 890 (2d Cir. 1980), "[s]purred first by the Great War, and then the Second, civilized nations have banded together to prescribe acceptable norms of international behavior."

Customary international law today is the outgrowth of, *inter alia*, the Charter of the United Nations, the expressed will of nation states through the prolific creation of international instruments and treaties, and the extensive post-war military tribunals. In particular, after 1945 new rules became part of the body of international law and traditional rules were strengthened and expanded, so as to explicitly reach even acts committed by states within their own territory against their own citizens.³⁸ Forty years ago Professor Jessup noted by example the "numerous provisions in the [United Nations] charter which recognize that the treatment of the individual citizen is no longer a matter solely of domestic concern and that the denial of fundamental human rights to a citizen can no longer be shrouded behind the impenetrable cloak of national sovereignty", and observed—

Sovereignty in the sense of exclusiveness of jurisdiction, in certain domains, and subject to overriding precepts of constitutional force, will remain a usable and useful concept just as in the constitutional system of the United States the forty-eight states are considered sovereign. *But sovereignty in its old connotations of ultimate freedom of national will unrestricted by law, is not consistent with the principles of community interest and of the status of the individual as a subject of international law.* . . .

P. Jessup, *The Subjects of a Modern Law of Nations*, 45 Mich. L. Rev. 383, 407-8 (February, 1947) (emphasis supplied).

The Nuremberg trials held criminal the activities of government officials who, among other crimes against humanity, facilitated genocide within Germany and occupied countries. The sovereign immunity defense raised by the leaders of Nazi Ger-

³⁷ See Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, B.Y.I.L. XXVIII (1951) at 228, to the effect that no rule of international law obliges states to grant jurisdictional immunity to other states.

³⁸ See Blum & Steinhardt, *supra* at 66-67.

many was emphatically rejected by the Tribunal.³⁹ Moreover, in *In re Yamashita*, 327 U.S. 1 (1946), this Court did not consider a sovereign immunity defense for high ranking foreign officers accused of violating international law in foreign territory. The post-Nuremberg world has, by "the general assent of civilized nations", *The Paquete Habana*, *supra*, greatly expanded the list of prohibited international crimes and "universal offenses", Restatement §404, Comment (a) and Reporter's Note 3. The traditional concept of sovereign immunity is, of necessity, correspondingly diminished, and will not lie where universally recognized violations of international law are concerned.

In *Sabbatino*, Justice White argued against application of the act of state doctrine where he believed that the defendant had violated international law, and said in his dissent:

The reasons for nonreview, based as they are on traditional concepts of territorial sovereignty, lose much of their force when the foreign act of state is shown to be a violation of international law. All legitimate exercises of sovereign power, whether territorial or otherwise, should be exercised consistently with rules of international law, *including* those rules which mark the bounds of lawful state action against aliens or their property located *within the territorial confines of the foreign state*. (Emphasis supplied). 376 U.S. at 457 (White, J., dissenting).

"[I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance",⁴⁰ *Baker v. Carr*, 369 U.S. 186, 211 (1962), and it has been observed that "[t]he dignity of foreign states is no more impaired by their being subjected to the law, impartially applied, or a foreign country than it is by submission to their own law", Lauterpacht, *supra*

³⁹ *The Nurnberg [sic] Trial* 1946, reprinted in 6 F.R.D. 69, 110-111. At Nuremberg, Admirals Rader and Doenitz were convicted of violating international law by setting up large operational zones and ordering indiscriminate submarine attacks without warning on all vessels, neutral or otherwise, found in those zones. Brittin, *International Law for Seagoing Officers*, at 249 (1981).

⁴⁰ As this Court noted in *Sabbatino*, 376 U.S. 398, 428, the balance may shift in favor of assuming jurisdiction "if the government which perpetrated the challenged act of state is no longer in existence." Such is the case here.

at n. 37. Moreover, the act complained of here is contrary to the domestic law of Argentina⁴¹ and petitioner's disingenuous reference to "claims . . . traditionally . . . the subject of diplomatic es-

⁴¹ Argentine prize law and practice, beginning in its War of Independence with Spain, drew heavily on Spanish law. The Spanish Corsair Ordinance of June 20, 1801 (App. 8a-9a, *infra*) was utilized by Argentine prize courts without change until supplemented by Argentina's Provisional Regulations For Privateering issued on May 5, 1817. Moreno, *Las Presas Maritimas En La Republica Argentina*, Centro de Estudio de Derecho Internacional Publico, (1926), pp. 1-26; *Historia Maritima Argentina*, Vol. IV, pp. 464-502 (1985), publication of the Armada Argentina. This code incorporated the law of nations. For example, Articles 8 and 19 (App. 9a, *infra*) mandated the use of prize courts for adjudication of prizes, Article 21 (App. 8a, *infra*) guaranteed the right of innocent passage to neutral ships, and Articles 22 and 44 (App. 9a-10a, *infra*) directed restitution of neutral property or payment of compensation. Under Article 22, the king was obligated to "resolve the compensation and the rest that corresponds in order to correct damages and to avoid it in the future." Argentine prize cases are reported through 1836, including several where restitution was ordered to neutral ship and cargo owners, see *The Hazard*, Corsarios: 1818-1830, Legajo 2, numero 88 (1827) (restitution and damages for illegal capture in favor of American shipowner affirmed on appeal).

In the war between Argentina and Brazil, the Argentine government, in its decree of November 4, 1828 (App. 8a, *infra*) created a three member commission to consider and settle claims by neutral shipowners for illegal acts committed by Argentine privateers.

On July 19, 1830, Argentina and Great Britain entered into a convention which provided for a commission in London to hear claims brought by individual ship and cargo owners (App. 6a-8a, *infra*). Art. V states that the commissioners, both in deciding the cases and in procedure, "shall guide themselves by the general rules and practice according to the Law of Nations" (App. 7a, *infra*). Both Great Britain and Argentina appointed commissioners. In case of disagreement, an umpire, the ambassador of Denmark, later substituted by Sweden, was involved. Of interest is *The Concord* decision, where the Swedish ambassador directed Argentina to pay the shipowner's damages for the captor's failure to exercise visit and search before seizing the ship. Moreno, *supra* at pp. 54-57, and 77-78. According to Moreno, *supra* at 109, although the prize regulations were abrogated by Art. 100 of the Argentine Constitution, Argentine federal courts have jurisdiction over such cases under the same article which gives the courts their "admiralty and maritime jurisdiction." Moreno, *supra*, pp. 108-109. Art. 31 of the Constitution, (App. 8a, *infra*) incorporates the "Law of Nations" and also "Treaties [which are] the supreme law of the nation."

pousal, international conciliation or consensual arbitration or litigation in an international forum"⁴² ironically underscores the denial of justice⁴³ by all avenues to respondents in Argentina and their inability to pursue their claims elsewhere.⁴⁴

Whatever may be the status of rights more recently defined as being of universal concern, such as those now recognized by the international law of human rights, it has long been established

⁴² In fact, it is traditional that claimants such as respondents exhaust their remedies in the prize courts of the belligerent state *before* resorting to diplomatic intervention, *The Zamora* [1916] 2 A.C. 77, 91.

⁴³ Denial of justice is itself an established violation of international law. See Restatement §711 and §711 Comment (a); §906 and Comments to 906; H.W. Briggs, *The Law of Nations — Cases, Documents & Notes* at 677-680, (2d Ed. 1952; Appleton-Century-Crofts, Inc., New York). The term has been defined broadly to include error resulting in manifestly unjust judgments; and narrowly to apply simply to the obstruction of access to courts. I. Brownlie, *Principles of Public International Law*, at 529-531 (Clarendon Press; Oxford; 3rd ed. 1979). Credit for development of the concept of "denial of justice" has been claimed on behalf of Latin America, by Latin American jurists. J. Irizarry y Puente, *The Concept of Denial of Justice in Latin America*, 43 Michigan L. Rev. 383 (1944). Latin America accepts the concept insofar as it bespeaks an obligation to allow foreigners easy access to national courts and to legal remedies. Whiteman, *Digest of International Law* (1963) viii at 727 (quoting from Inter-Am. Juridical C'ee Report, 1961); and Brownlie, at 530. On the requirement of exhaustion of local remedies before a claim of denial of justice may be made, Sir Hersch Lauterpacht has said:

The requirement of exhaustion of local remedies is not a purely technical or rigid rule. It is a rule which international tribunals have applied with a considerable degree of elasticity. In particular, they have refused to act upon it in cases in which there are, in fact, no effective remedies available owing to the law of the State concerned or the conditions prevailing in it.

Case of Certain Norwegian Loans (France v. Norway), Judgment, July 6, 1957, separate opinion by Judge Lauterpacht, I.C. J. Reports (1957) 39.

⁴⁴ Argentina is not subject to the compulsory jurisdiction of the International Court of Justice or, as far as respondents are aware, of any other international tribunal.

that "[n]eutral trade is entitled to protection in all courts",⁴⁶ *The Bermuda's Claimants v. United States*, 70 U.S. 514, 551 (1865). The "simple, humane and universally accepted" right of neutral vessels to be free from unprovoked and illegitimate acts of violence has been recognized in the law of nations over centuries. *The Lusitania*, 251 F. 715 732-736 (S.D.N.Y. 1918). The obligation to provide access to justice where that right is violated is similarly grounded in the immemorial practice of maritime nations.

"In cases such as that now in judgment, we administer the public law of nations, and are not at liberty to inquire what is for the particular advantage or disadvantage of our own or another country. We must follow the lights of reason and the lessons of the masters of international jurisprudence", *The Peterhoff v. The United States*, 72 U.S. (5 Wall.) 28, 57 (1866).

Where the injury complained of is the unprovoked and illegal attack on a neutral merchant vessel in innocent passage on the high seas, while engaged in the United States domestic trade, and where petitioner has refused to provide so much as a hearing of the injured parties' claims, respondents submit that the court of appeals correctly denied immunity to petitioner for its acts in violation of the ancient law of the sea.

POINT IV

The FSIA Should Not Be Interpreted So As To Impliedly Repeal The Alien Tort Statute Of 1789, Or To Abridge By Implication The General Admiralty Jurisdiction Of The Federal Courts

⁴⁶The competence of federal courts, under United States law, to hear claims such as respondents' in admiralty cannot be questioned. "Every violent dispossession of property on the ocean is, *prima facie* a maritime tort; as such, it belongs to the admiralty jurisdiction . . .", *L'Invincible*, 14 U.S. (1 Wheat.) 238, 257-258 (1816) (holding that a sovereign cannot be held accountable in another nation's courts for the legitimate exercise of wartime powers, and recognizing the necessity of judicial review: "[w]ithout the exercise of jurisdiction thus far, in all cases, the power of the admiralty would be inadequate to afford protection from piratical capture", *id.* at 258). As petitioner recognizes, "the cases defining the 'jurisdiction' of admiralty courts use that term in the sense of judicial jurisdiction or competence of courts" (emphasis supplied). Brief for Appellee at 13, *Amerada Hess Shipping Corp. v. Argentine Republic*, 830 F.2d 421 (1987).

The Alien Tort Statute by its very terms vests jurisdiction in the district court to hear respondents' claims. It provides to respondents both a right of action and a forum.⁴⁶ The jurisdictional requirement of a violation of the law of nations, or a violation of a treaty, by definition contemplates state, as well as individual, defendants. Respondents are aliens; they sue in tort; and the injury of which they complain violates principles recognized in the law of nations since ancient times and for which that law does not accord immunity (Point II, *supra*).

The FSIA contains no repealing clause, and there is no mention of the Alien Tort Statute in the Act, or in its legislative history. Congress is "presumed to legislate with knowledge of former related statutes", *Continental Insurance Co. v. Simpson*, 8 F.2d 439 (4th Cir. 1925). The legislative history of the FSIA evinces an extraordinary amount of care and attention on the part of the drafters. More than ten years elapsed from the time that Congress began its study of possible legislation in the area to the time of enactment of the final bill. H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. 14 reprinted in 1976 U.S. Code Cong. & Ad. News 6604, 6608 ("House Report"). The body of the Act is contained in §§1330 and 1602-1611 of Title 28; §§1332 (diversity), 1391 (venue), and 1441 (actions removable) were all amended concurrent with the passage of the Act. The Alien Tort Statute, §1350 of Title 28, in close proximity on the statute books to two of the amendments, and to the newly added §1330, was left completely untouched.

In contrast, when the FSIA was enacted Congress specifically chose to eliminate diversity jurisdiction over foreign states under 28 U.S.C. §1332 (*see* former text of §1332 at 62 Stat. 869, 930 (Act of June 25, 1948) Ch. 646). No similar modification was made to §1350, and Congress' decision not to limit jurisdiction over foreign states under the Alien Tort Statute is particularly significant, since states are principal subjects of treaties, and of the law of nations,⁴⁷ plainly referred to therein. Congress clearly did not intend, in enacting the FSIA, to eliminate that jurisdiction *sub silencio*. *Von Dardel v. Union of Soviet Socialist Republics*, 623 F. Supp. 246, 254 (D.D.C. 1985). "It is, of course, a cardinal principle of

⁴⁶*Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 777-782 (D.C. Cir. 1984) (Edwards, J., concurring), *cert. denied*, 470 U.S. 1003 (1985); 26 Op. Att'y. Gen. 250, 252-253 (1907).

⁴⁷*See* Dickinson, *supra* n.14; The Nurnberg Trial [sic] 1946, reprinted in 6 F.R.D. 69, 110-111.

statutory construction that repeals by implication are not favored", *United States v. Continental Tuna Corp.* 425 U.S. 164, 168 (1976).

The legislative history of the FSIA, which begins by expressing concern as to whether United States "citizens will have access to the courts to resolve *ordinary* legal disputes" involving other countries (emphasis supplied) (House Report at 6605), demonstrates that the focus of Congress in enacting the FSIA was overwhelmingly directed toward commercial matters. The proposed bill is described as "urgently needed" "in a modern world where foreign state enterprises are every day participants in *commercial* activities" (*ibid.*) (emphasis supplied), and the committee hearings and reports are replete with illustrations and hypotheticals referring specifically to business situations (House Report; *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 94th Cong., 2d Sess. (1976) ("1976 Hearings")).⁴⁸ The legislative history indicates that even FSIA §1605 (a) (5), which refers to non-commercial torts, although deliberately "cast in general terms" was drafted "primarily [with] the problem of traffic-accidents" in mind (House Report at 6619-6620). FSIA §1605(a) (3) (relating to expropriation claims), on which the United States attempts to rely (U.S. *amicus* at 24) as evidence that Congress considered extraordinary violations of international law in drafting the Act, is inextricably tied to the commercial activities of foreign states or their agencies and instrumentalities.

There is simply no mention in the Act, or in its legislative history, of non-"ordinary" violations of international law, such as that suffered by respondents, or such as arise in the area of human rights.

⁴⁸The United States' reference (U.S. *amicus* at 20) to Representative Jordan's query about the *Mayaguez* incident, and whether it would have been affected in any way by a bill such as the FSIA, is misleading. Legal Adviser Leigh's response that "there's nothing in this bill which would affect that situation-nothing" (1976 *Hearings*, at 53-54) entirely supports respondents' position that the FSIA does not extinguish the long established right of a shipowner whose vessel is destroyed on the high seas in violation of international law to sue for compensation from the state.

The Alien Tort Statute serves an important purpose—it is "an extraordinary basis of federal jurisdiction" which allows access to federal courts where "the conduct of the parties so offends the standard of conduct underpinning international relations that it can be considered to be a violation of the law of nations", *Valanga v. Metropolitan Life Insurance Company*, 259 F. Supp. 324, 328 (E.D. Pa. 1966); *IIT v. Vencap, Ltd.*, 519 F.2d 1001 (2d Cir. 1975).

As the court of appeals recognized, the class of actions that rise to the level of an international law violation is extremely small (Pet. App. 16a). Of suits brought under the Alien Tort Statute, see, e.g., *DeWit v. KLM Royal Dutch Airlines, N.V.*, 570 F. Supp. 613 (S.D.N.Y. 1983) (no action for infringement of constitutional rights, or for breach of contract); *Huynh Thi Anh v. Levi*, 586 F.2d 625 (6th Cir. 1978) (no action for claim by resident alien for custody of children); *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975) (Friendly, J.) (mere fact that every nation's municipal law may prohibit theft does not incorporate "the Eighth Commandment, 'Thou Shalt Not Steal' [into] the law of nations"). Petitioner's contention that a court sustaining jurisdiction under the Alien Tort Statute "constitute[s] itself as an international claims court" is without merit (Pet. Br. at 16).⁴⁹

It has never been a rule of law that foreign states must be accorded immunity in United States courts⁵⁰—"[a]s *The Schooner Exchange* made clear, foreign sovereign immunity is a matter of

⁴⁹Nor does the court of appeals' decision grant, as petitioner and the United States suggest, greater rights to aliens than to United States citizens to sue foreign states. Courts have declined to interpret the FSIA as shielding foreign states from liability for conduct "clearly contrary to the precepts of humanity as recognized in both national and international law", *Letelier v. Republic of Chile*, 488 F. Supp. 665, 673 (D.D.C. 1980); accord, *Liu v. Republic of China*, 642 F. Supp. 297, 305 (N.D. Cal. 1986). Petitioner's allusion to *Chaser Shipping Corp. v. United States*, 649 F. Supp. 736 (S.D.N.Y. 1986), *aff'd*, 819 F.2d 1129 (2d Cir. 1987) (unpublished opinion), *cert. denied*, 108 S.Ct. 695 (1988), is misleading. The "doctrine of foreign sovereign immunity is quite distinct from the doctrine of domestic sovereign immunity . . . being based upon considerations of international comity. . . , rather than separation of powers". *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 207 n.5 (D.C. Cir. 1985).

⁵⁰Nor is there any rule of international law requiring immunity. See Lauterpacht, *supra* at n.37.

grace and comity on the part of the United States," *Verlinden v. Cental Bank of Nigeria*, 461 U.S. 480, 486 (1983).

The doctrine expounded in *The Schooner Exchange*, on which the United States mistakenly relies, is one of implied consent by the territorial sovereign to exempt the foreign sovereign from its "exclusive and absolute" jurisdiction, an implication based, in a proper case, upon considerations of comity, *id.* at 136-144. Under *The Schooner Exchange*, the immunity of the foreign state is an exception to the territorial jurisdiction of the local state⁵¹—there is no blanket immunity enunciated for foreign states as a general rule, nor is any principle of international law invoked as granting a foreign state immunity as a matter of right. Moreover, this presumption of a voluntary waiver of territorial jurisdiction by the local sovereign is reversible:

"Without doubt, the sovereign of the [local state] is capable of destroying this implication. He may claim and exercise jurisdiction either by employing force, or by subjecting [the public armed vessels of the foreign state] to the ordinary tribunals . . ." 11 U.S. (7 Cranch) at 146 (emphasis supplied).

As this Court has recognized, the FSIA was intended to codify existing law, and was "designed to remove one particular barrier to suit namely, sovereign immunity. . .", *Dames & Moore v. Regan*, 453 U.S. 654, 685 (1981). The FSIA codifies the "restrictive theory" of immunity, the thrust of which is to limit the immunity to which a foreign state may be entitled for its commercial, or private, acts. The "restrictive" doctrine is itself a product of the progressive rejection of the concept of sovereign immunity as a whole; forty years ago it was observed that its development was "was not altogether unrelated to the incipient recognition of human freedoms as part of positive international law," Lauterpacht, *supra* at n. 37. Petitioner's, and the United States', interpretation of the FSIA would result in a contraction of existing jurisdiction

⁵¹This distinction apparently eludes the United States, although it is acknowledged in the legislative history of the FSIA. Compare U.S. *amicus* at 8 (FSIA "lifts a foreign state's immunity to suits . . . only if") with House Report at 6606 "(Sovereign immunity is a doctrine of international law under which domestic courts, in appropriate cases, relinquish jurisdiction over a foreign state)" (emphasis in both quotations supplied).

over foreign sovereigns when the Act was the product of a trend, and an intention, to expand it.

The illogic of the construction urged by petitioner and by the United States, and the soundness of the court of appeals' analysis may be illustrated by reference to *The Santissima Trinidad*, 20 U.S. (7 Wheat.) 283 (1822), which was a suit to recover property seized in violation of the law of nations on the high seas, by a public warship of the Buenos Aires government of the United Provinces of Rio de la Plata. Although engaged at the time in a war of independence with Spain, the United Provinces were treated by the Court as an independent sovereign for purposes of the rules of belligerent rights. The property—a prize, taken in breach of the laws of neutrality—was brought into a United States port, and this Court, affirming the lower court decisions, decreed restitution to the original Spanish owners. The case exemplifies jurisdiction over foreign sovereign acts in violation of the law of nations. Justice Story's opinion noted that grounds for immunity were "not founded upon any notion that a foreign sovereign had an absolute right" and that foreign ships of war entering United States ports may receive immunity, as a matter of comity, only if they "demean themselves according to law"; the Court found that prizes taken in violation of the law of nations are "infect[ed] . . . with the character of torts" and that property taken by a foreign sovereign in violation of the law of nations "is liable to the jurisdiction of our Courts." *Id.* at 349, 352-354.

The necessary consequence of the arguments advanced by petitioner and by the United States⁵² as to the "restrictive theory" embodied in the FSIA, and as to the "exclusivity" of that statute, is that such a case could not be brought today—either by an alien, or by a United States citizen. This, respondents submit, stands the underpinning of a doctrine, aimed at narrowing the scope of immunity overall, on its head—the result is to require a breadth

⁵²The United States' contention that recognition of respondents' causes of action "would adversely affect the foreign relations of the United States" is belied by its position in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980): "[when] there is a consensus in the international community that the right is protected and that there is a widely shared understanding of the scope of this protection . . .

of immunity not recognized in even the eighteenth century. It would, indeed, be "odd" to hold that by enacting the FSIA Congress tacitly intended to broaden the scope of immunity to this degree (Pet. App.12a).

"International law is part of our law, and must be ascertained and administered by the courts of appropriate jurisdiction as often as questions of right depending on it are duly presented for their determination", *The Paquete Habana*, 175 U.S. 677, 700 (1900). International law outlaws, and abhors, the act of violence suffered by respondents (*supra*, Point II). Moreover, it has been recognized by the International Court of Justice that universally accepted rights "are the concern of all states", that all states "have a legal interest in their protection" and that "they are obligations *erga omnes*", *Case Concerning The Barcelona Traction Light & Power Co.* (Belg. v. Spain), 1970 I.C.J. 4, 33 para. 33.

It is a fundamental rule of construction that "an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains, and consequently, can never be construed to violate neutral rights . . ." *The Charming Betsey*, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, C.J.). The legislative history of the FSIA indicates that the Act was intended to incorporate, and be consistent with, "standards recognized under international law" (House Report at 6606, 6613). Respondents respectfully submit that it would be error to construe the FSIA in a manner inconsistent with, or violative of, international law, by requiring immunity for—and therefore sanctioning—the international law violations presented in this case.

Nor should the FSIA be interpreted so as to abridge, by implication, the Constitutional grant of admiralty and maritime jurisdiction to the federal courts, U.S. Const. art. III, §2. *Panama Railroad Co. v. Johnson*, 264 U.S. 375 (1924).

Federal courts in admiralty traditionally "administer the law of nations in a season of war, and . . . determine the question of prize

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there is little danger that judicial enforcement will impair our foreign policy efforts", *Memorandum for the United States as Amicus Curiae, Filartiga v. Pena Irala*, 630 F.2d 876 (2d Cir. 1980) reprinted in 19 I.L.M. 585, 601 (1980).

or no prize in . . . judicial proceeding[s]", *The Propeller Genesee Chief*, 53 U.S. (12 How.) 443 (1851). See also *The Amiable Nancy*, 16 U.S. (3 Wheat.) 546 (1818) (under the general admiralty and maritime jurisdiction, federal courts have jurisdiction without reference to statute to hear suits sounding in prize). Indeed, the admiralty jurisdiction predates the Constitution, in which it is incorporated: "[t]hese cases are as old as navigation itself, and the law admiralty and maritime, as it has existed for ages, is applied by our courts to the cases as they arise", *American Insurance Co. v. Canter*, 26 U.S. (1 Pet.) 511, 545 (1828) (Marshall, C.J.).

Respondents' claims fall within the traditional ambit of the admiralty jurisdiction of the federal courts. "[T]here are boundaries to the maritime law and admiralty jurisdiction which inhere in those subjects and cannot be altered by legislation, as by excluding a thing falling clearly within them or including a thing falling clearly without", *Panama Railroad Co. v. Johnson*, *supra* at 386. The section-by-section analysis submitted with the proposed bill for the FSIA in 1973 indicates that the Act was not intended "to alter the specialized jurisdictional regimes . . . dealing with admiralty, maritime and prize cases", and that "[a]ctions in such areas, even if against a foreign state, would continue to be governed by these special regimes", *Immunities of Foreign States: Hearing on H.R. 3493 Before the Subcomm. on Claims and Governmental Relations of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. (1973) at 47 (emphasis supplied). Respondents respectfully urge that the FSIA should be interpreted consistently with the constitutional grant of admiralty jurisdiction by reference to §1603(c) and §1605(a)(5), as discussed *infra*, at Point V.

POINT V

Petitioner Is Not Entitled To Immunity Under The FSIA.

Since the tortious act of the Argentine Republic took place on the high seas, and the losses suffered by respondents occurred within the United States, the requirements of the exception to immunity contained in FSIA §1605(a) (5) are satisfied. There is no "discretion" to commit illegal acts, *Letelier, supra*, 488 F. Supp. at 673, and exceptions to immunity in the FSIA are "based upon the general presumption that states abide by international law", *West v. Multibanco Comermex*, 807 F.2d 820, 826 (9th Cir. 1987), *cert. denied*, 107 S.Ct. 2463 (1987).

By statutory definition, the tort took place in the United States. Under 28 USC §1603(c), the term "United States" includes "all territory and waters, continental and insular, subject to the jurisdiction of the United States." (Emphasis supplied.)

The word "territory" includes not only land but coastal waters including "a marginal belt of the sea extending from the coast line outward a marine league, or three geographic miles", *Cunard S.S. Co. v. Mellon*, 262 U.S. 100, 122 (1922); *Law of Naval Warfare*, Article 412 (A412). Modern usage has extended U.S. territory to 200 nautical miles. "Ocean Policy and the Exclusive Economic Zone," U.S. Dept. of State Policy No. 471, March 10, 1983 (A343-A346). By treaty, the United States recognizes waters beyond the territorial sea (12 miles) and the exclusive economic zone (200 miles) as the high seas. Art. 1, Geneva Convention on the High Seas, 13 UST 2312 (1958). ("The term 'high seas' means all parts of the seas that are not included in the territorial sea or in the internal waters of a state") (A319); Convention on the Law of the Sea (1982) (A328, / 330); Proclamation by the President of the United States, March 10, 1983 (A341); *The Law of Naval Warfare*, Article 413 (A412). Accordingly, "waters" in 28 U.S.C. §1603(c), refers to waters beyond the territorial sea, or the high seas.

The scope of §1603(c) is made plain in the legislative history, H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. (1975), *reprinted in* [1976] U.S. Code Cong & Admin. News 6604, 6614 as follows:

(c) United States—Paragraph (c) of section 1603 defines "United States" as including *all* territory and *waters subject to the jurisdiction of the United States*. (Emphasis supplied).

The attack on HERCULES took place on the high seas, "waters . . . subject to the jurisdiction of the United States."⁵³ For example, in *The Plymouth*, 70 U.S. (3 Wall.) 20, 36 (1865), the Court defined tort jurisdiction in admiralty as follows:

"Every species of tort, however occurring, and whether on-board a vessel or not, if upon the high seas or navigable waters is of admiralty cognizance."⁵⁴

See also *United States v. Matson Navigation Co.*, 201 F.2d 610, 613 (9th Cir. 1953) and *Waring v. Clark*, 46 U.S. (5 How.), 441, 474, (1847) citing Story, 3 *Com. on Const.* §1659, at 496:

"The jurisdiction claimed by the courts of admiralty as properly belongs to them extends to all acts and torts done upon the high seas . . ."

Even if this Court were to interpret the "waters" language of 28 U.S.C. § 1603(c) as excluding some portion of the high seas, no interpretation could be proper which excluded waters where ships such as HERCULES, engaged solely in the U.S. domestic trade, sail on voyages from one U.S. port to another U.S. port. Therefore, under 28 USC §1603(c), the tortious attack on HERCULES occurred within the "United States".

Respondents have sustained direct financial losses occurring in the United States. The charter hire which Amerada Hess paid United for the use of HERCULES was payable in New York each month in the minimum sum of \$184, 770 (clause 5 of the charter party calculates hire at \$2.25 per ton x 82,120 tons) (JA-41); the loss of these payments was suffered in New York by United, which also suffered the loss of a vessel employed in the United States domestic trade. Amerada Hess was deprived of the use of a vessel in the domestic, intercoastal trade, and of the bunkers aboard her which were sold and delivered within the United States. Injury was also suffered by virtue of the disruptive effect of the loss of HERCULES on the energy policies of the United

⁵³ The legislative history indicates that a tortious act or omission under §1605(a) (5) need not physically occur within the United States, but "must occur *within the jurisdiction of the United States*". *Id.* at 6619 (emphasis supplied).

⁵⁴ This definition was later modified in *Executive Jet Aviation Co. v. Cleveland*, 409 U.S. 249 (1972) to "require also that the wrong bear a signifi-

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States, as well as on the supply of American crude oil to Hess' U.S. refinery (A58 and JA109-111). Similar losses have been found to satisfy the requirements of the FSIA.

In *Matter of Rio Grande Transport, Inc.*, 516 F. Supp. 1155 (S.D.N.Y. 1981), a vessel owned by an agency of the Algerian government collided with an American flag ship on the high seas, resulting in the loss of the American vessel, her cargo, and five of her crew. In response to claims brought by attorneys for the cargo owner—the government of Tunisia—as well as attorneys for the next of kin of the deceased crewmen, the American shipowner filed a limitation proceeding. At the same time, Algeria asserted a claim of sovereign immunity on behalf of its government-owned corporation. The court found that the Algerian claim of sovereign immunity must fail under the provisions of the FSIA. Specifically, the court found that the freight due the American owner, payable in the United States, constituted a financial injury within the United States, *id.* at 1163. The court found further that the loss of Tunisia's grain cargo had a direct effect on the United States because the grain was purchased through the United States government's P.L. 480 program, and the loss of grain impeded American foreign policy means and objectives, *id.* at n. 9. United's loss of the vessel and charter hire, and Amerada Hess' loss of use of HERCULES and her bunkers, with the resulting disruption to its American refining operations, similarly satisfy the "damage to, or loss of property, occurring in the United States" requirement of FSIA §1605 (a) (5). Accordingly, since both the tort and the injury occurred within the United States, the Argentine Republic is not entitled to immunity under the FSIA.

The *amicus curiae* brief of the Republic of Liberia in the court below rightly pointed out that a denial of access to United States courts can be considered a violation of the Treaty of Friendship, Commerce and Navigation Between the United States and Liberia, August 8, 1938; United States—Liberia, 54 Stat. 1739, T.S. No.

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cant relationship to traditional maritime activity." *Id.* at 268. An attack by military aircraft delivered against a ship at sea bears "a significant relationship to traditional maritime activity." *T.J. Falgout Boats, Inc. v. United States*, 508 F.2d 855, 857-858 (9th Cir. 1974), *cert. denied*, 421 U.S. 1000 (1975).

956 ("FCN Treaty").⁵⁵ There is little doubt that if the facts before the Court were the same, but HERCULES an American flag ship, respondents would be entitled to their day in court.

In addition to the tort occurring in waters subject to the jurisdiction of the United States, as has been shown, in the case of a U.S. flag vessel, the tort would be deemed to have occurred within United States territory.

In *Wildenhus' Case*, 120 U.S. 1, 12 (1886), this Court found:

"The general rule is well established, that the vessels of a nation are to be considered as part of its territory, and the persons on board them are deemed to be within the jurisdiction of such nation, and are protected and governed by the laws of the country to which such vessel belongs."

See also S.S. "*Lotus*", (France v. Turkey) 1927 P.C.I.J. (ser. A) No. 10, at 30-31 (Sept. 7) (collision on high seas between French and Turkish ships; courts of both countries have jurisdiction for criminal acts and compensation).

The territorial aspect of flag jurisdiction is "chiefly applicable to ships on the high seas, where there is no territorial sovereign," *Cunard S.S. Co. v. Mellon*, 262 U.S. 100, 123 (1922). See also Art. 6, Geneva Convention, (A320), *supra* at 4, and Art. 92 of LOS (A331), "ships shall sail under the flag of one state only and . . . shall be subject to its exclusive jurisdiction on the high seas."

⁵⁵ Article I of the FCN Treaty guarantees to respondents "freedom of access to the courts of justice [of the United States] on conforming to the local laws, as well as for the prosecution as for the defense of their rights, and in all degrees of jurisdiction established by law," and provides that respondents shall "receive the most constant protection and security for their persons and property, and shall enjoy in this respect that degree of protection that is required by international law." (*supra* at p. 6). The FCN treaty is self-executing without reference to statute. "It stands on the same footing of supremacy as do the provisions of the Constitution and laws of the United States. It operates of itself, without the aid of any legislation, state or national; and it will be applied and given authoritative effect by the courts." *Asakura v. Seattle*, 265 U.S. 332, 340, 342 (1924). The United States' construction of Article I of the FCN Treaty (U.S. *amicus* at p. 10, n.7) is disingenuous: if the FSIA is a "local law" to which respondents must conform, then so is the Alien Tort Statute.

Jurisdiction would thus exist under FSLA §1605(a)(5), as both the tort and the injury would be deemed to have physically occurred in U.S. territory.

POINT VI

The District Court Has Personal Jurisdiction Over Petitioner

This Court, in *Insurance Corp. of Ireland v. Compagnie Des Bauxites De Guinea*, 456 U.S. 694, 704 (1982), defined the requirement for personal jurisdiction as "a legal right protecting the individual", and has further stated that it "must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause' rather than a function 'of federalism concerns'." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 427 n.13 (1985), quoting *Insurance Corp. of Ireland v. Compagnie Des Bauxites De Guinea*, 456 U.S. at 702-703 n.10 (1982).

Whatever rights petitioner may have to avoid being haled into a U.S. Court (which have not already been addressed in connection with its claim of immunity),⁵⁸ these do not arise as an individual liberty interest under the Due Process Clause of the Fifth Amendment. It is inconceivable that petitioner should be accorded rights under the United States Constitution which have been denied to the individual states of the United States. See *South Carolina v. Katzenbach*, 383 U.S. 301, 323 (1966); *Palestine Information Office v. Shultz*, 674 F. Supp. 910, 919 (D.D.C. 1987), *aff'd*, No. 87-5398 (D.C. Cir., August 5, 1988) (Lexis: Genfed Library; U.S. App. File) ("If the States of the Union have no due process rights, then a 'foreign mission' *qua* 'foreign mission' surely can have none").

Even assuming, *arguendo*, that the determination of personal jurisdiction in this action is informed by the traditional due proc-

⁵⁸ In *Olsen By Sheldon v. Government of Mexico* 729 F.2d 641, 650 (9th Cir.), *cert. denied*, 469 U.S. 917 (1984), the court noted that "by denying immunity to foreign states defending certain claims, the FSIA reflects the modern realities of the interdependence of nations. Because personal jurisdiction turns on a determination of immunity, the FSIA represents Congress' decision that jurisdiction does not pose an affront to the sovereignty of the defending nation so serious as to preclude it."

ess inquiry, petitioner's mechanical approach to the issue ignores "the particular situation examined", *Hewitt v. Helms*, 459 U.S. 460, 472 (1983), and belittles the interest of this nation, and of the community of nations, in the freedom of the seas.

Although the Court addressed appropriate personal jurisdiction standards for common law claims in an international context in *Asahi Metal Industry v. Superior Court*, 480 U.S. 102 (1987), the standard for claims in an international context within the admiralty jurisdiction of United States courts has been different. Contrary to the cautionary approach advocated for common law claims in Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 Ga. J. Int'l. Comp. L. 1 (1987), the greater opportunities for denial of justice in the context of maritime claims have permitted admiralty courts to liberally exercise both *in rem* and *in personam* jurisdiction. In *Re Louisville Underwriters*, 134 U.S. 488, 493 (1890). For example, it has been held that ordinary due process requirements for minimum contacts applicable to common law claims are not strictly applicable in admiralty. See, e.g., *Merchants National Bank v. Dredge General G.L. Gillespie*, 663 F.2d 1338, 1350 n.18 (5th Cir. 1981); *Amstar Corp. v. S/S Alexandros J.*, 664 F.2d 904 (4th Cir. 1981); *Schiffahrtsgesellschaft Leonhardt & Co. v. A. Bottacchi S.A.*, F.2d 1528, 1535 (11th Cir. 1985) (*en banc*), *Polar Shipping Ltd. v. Oriental Shipping Corp.* 680 F. 2d 627 (9th Cir. 1982); *Grand Bahama Petroleum v. Canadian Transportation*, 450 F. Supp. 447, 459 (W.D. Wash. 1978).

The court of appeals properly found that petitioner has sufficient contacts with the forum so that the exercise of jurisdiction does not offend traditional notions of fair play and justice (Pet. App. 14a). Since respondents' causes of action are uniquely federal and maritime, the court correctly defined the "forum" as the United States, citing *Texas Trading and Milling v. Federal Republic of Nigeria*, 647 F. 2d 300, 314 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982): "[t]he relevant area for delineating contacts is the entire United States." See Degnan & Kane, *The Exercise of Jurisdiction Over and Enforcement of Judgments Against Alien Defendants*, 39 Hasting L.J. 799, 802-816 (1988); *Engineering Equipment Co. v. S.S. Selene*, 446 F. Supp. 706, 709-710 (S.D.N.Y. 1978);

Holt v. Klosters Rederi A/S, 355 F. Supp. 354, 357 (W.D. Mich. 1973).⁵⁷

The HERCULES attacks were not simply an isolated series of attacks on an innocent ship remote from the United States (Pet. App. 16). The attacks were carried out on a crude oil transportation system which had been in operation without change since 1977 (JA20, JA22 paras. 6, 7, and 17). HERCULES was the domestic sea transportation component, authorized by 46 U.S.C. §877, which delivered Alaskan crude oil directly to the HOVIC refinery at St. Croix where it was refined and distributed to homes, businesses and U.S. government agencies throughout the continental United States.⁵⁸ Petitioner's attacks on HERCULES were a disruption of this supply system (June 16, 1982 letter to President Reagan from Congressman Young, JA109). Accordingly, there can be no serious dispute that petitioner's attack disrupted the Amerada Hess Alaskan oil distribution system with direct effects attributed to Alaska and the U.S. Virgin Islands, as well as the various states which depend on Alaskan oil for a source of their refined petroleum products. This injury clearly occurred in the forum and constitutes an overwhelming contact.

⁵⁷ A "national contact test" is supported by petitioner's contention that the Due Process Clause of the Fifth Amendment governs *in personam* jurisdiction (Pet. Br. at 12). Moreover, petitioner's contentions with respect to its contacts "with the United States" assume the applicability of a national contacts test (Pet. Br. at 35).

⁵⁸ The parent of respondent Amerada Hess, a Delaware Corporation, invested over \$80 million dollars in building its "Alaskan Crude Oil Refinery Unit" at HOVIC for this system. Typically 83% of the refined products from HERCULES' cargoes was consumed in the continental United States, with the balance purchased directly by the U.S. government. An economic analysis of this system is contained in *American Maritime Association v. Blumenthal*, 590 F.2d 1156, 1158-59 n.10 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 943 (1979). Petitioner was fully aware of this trade from the hundreds of daily AMVER messages sent by HERCULES to petitioner's radio station "General Pacheco" on its identical voyages in 1977-1982. (JA20-21). AMVER is operated by the U.S. Coast Guard pursuant to 46 C.F.R. §307.

Petitioner is not before this Court because of the unintentional "placement of a product into the stream of commerce", which this Court considered in *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987). Nor is petitioner here because of a breach of contract as in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985).⁵⁹

Petitioner is here because it intentionally attacked a "United States interest" neutral vessel employed in the United States domestic trade. Petitioner's intentional acts caused injuries indisputably within the forum and call for application of jurisdictional standards appropriate to the nature of its actions. The "intentional, and allegedly tortious actions, were expressly aimed at [the United States] . . . [a]nd they knew that the brunt of . . . the injury would be felt by respondent[s] in the [United States] . . . [u]nder the circumstances, petitioner must 'reasonably anticipate being haled into court there.'" *Calder v. Jones*, 465 U.S. 783, 789-790 (1984).⁶⁰ This is especially true since petitioner shut the door to its forum on respondents' claims. *McGee v. International Life Ins.*, 355 U.S. 220, 223 (1957).

A "single indirect contact" which arises from the cause of action is sufficient to satisfy due process requirements. See *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414-415 (1984); *Degnan & Kane, supra*, at 820. This is particularly true when, instead of a product being carried into a forum by chance, petitioner has carried out an intentional tort directed against that forum's economy. The attack on the crude oil system, of which HERCULES was a vital link, is a sufficient contact by any jurisdictional yardstick.

The attack also directly caused the loss of the charter hire payments due in New York City, and of the bunkers which had also

⁵⁹ Both *Asahi Metal Industry Co. v. Superior Court, supra*, and *Burger King Corp. v. Rudzewicz, supra*, are also distinguishable because they involve consideration of due process under the 14th amendment in connection with a state long-arm statute, factors not present in this case.

⁶⁰ §421 (2)(j) of the Restatement recognizes a similar "effects" test with respect to jurisdiction to adjudicate under international law.

been purchased in New York (JA41 and A58).⁶¹ See *In the Matter of Rio Grande Transport Inc.*, 516 F. Supp. 1115, 1163 (S.D.N.Y. 1981) (loss of freight payable in the United States, and grain cargo exported from the United States, due to a collision on the high seas constitute injuries in the United States for jurisdictional purposes.)

Petitioner's claim that it did not "engage in any purposeful activity directed at the United States for which it could have reasonably anticipated being haled into Court in this country" (Pet. Br. at 40) is inconsistent with the record before the Court. The June 3, 1982 warning delivered to the Argentine Embassy by the U.S. government stated that "the Liberian Flag tankers are carrying Alaskan oil to the U.S. Virgin Islands via Cape Horn" (JA60). The warning was followed by the specific identification of HERCULES, her route, and her ETA (estimated time of arrival) of 8-11 June (JA60). The warnings were received, as shown by petitioner's use of the HERCULES call sign in the "cover up" message following the attacks (JA23, para. 28). It is hard to imagine how a more straightforward and clear warning of the neutral noncombatant status of HERCULES and its nexus to the United States could be drafted. The warning on its face clearly informed Argentina that HERCULES was on a voyage from one U.S. port to another U.S. port, and that the ship was to be afforded identical treatment to the U.S. flag ships listed in the same message (JA60). The message is more than a "fair warning that a particular activity may subject [petitioner] to the jurisdiction of a foreign sovereign." *Burger King Corp. v. Rudzewicz*, *supra* at 472, quoting *Shaffer v. Heitner*, 433 U.S. 186, 218 (1977). Petitioner's argument that it was not reasonably foreseeable that there would be litigation resulting from its attack on HERCULES is untenable, in view of its clear violation of international law and the universally recognized compensatory obligations for such conduct.

Petitioner was under an affirmative duty to advise the United States or the ships involved that their rights of innocent passage would not be respected. Since petitioner cannot truthfully claim

⁶¹ The charter was negotiated and executed in New York City (JA41). HERCULES was operated by United's agents and Amerada Hess from that city (JA61-62). The attacks also destroyed this New York-based commerce and further deprived respondent Amerada Hess of the use of HERCULES in the U.S. domestic trade.

the appearance of HERCULES was unexpected (JA20-23, paras. 8, 9, 11, 16, 19, 21, and 23),⁶² petitioner's silence, following receipt of the United States warning, misled respondents to believe that HERCULES would not be harmed on its voyage. Petitioner's silence in the face of such warnings was a message in itself and induced reliance by respondents which must be considered an act for jurisdictional purposes.⁶³

HERCULES was a participant in the AMVER system (JA21, paras. 10 and 11) and the complaint specifically alleges that Argentina "made improper use of the AMVER System for military purposes, in violation of international law and practice." (JA25, para 39). It further appears that petitioner had purposefully availed itself of the benefits of the U.S. Coast Guard's AMVER system on a continuous and systematic basis.⁶⁴ Petitioner tortiously misused the information provided by AMVER to aid its attack on HERCULES (JA25). Yet, petitioner has attempted to ignore its use of HERCULES' AMVER reports when discussing

⁶² Petitioner's logic would similarly dismiss the white flag flown by HERCULES before the second and third attacks as insufficient notice (JA63). The white flag of surrender under "customary international law" is notice to a belligerent that noncombatants are present or that enemy forces have surrendered. Further attacks are strictly prohibited. *The Commanders' Handbook on the Law of Naval Operations* (NWP 9) (1987) at §11.10.4.

⁶³ The complaint and record also set out the direct contact between petitioner's armed forces and HERCULES in searching for the survivors of the Argentine cruiser GENERAL BELGRANO (JA21-22, Paras. 15 and 16, and JA70). During the search by HERCULES in the sector assigned to it by the Argentine Navy ship BAHIA PARAISO, the ships "exchanged information". (JA70). Without question, these acts of petitioner's armed forces are directly related to the later loss of the ship. These acts, and petitioner's exclusion zone limits, induced respondents to believe that the ship and her cargo would be safe as long as they maintained neutral status and complied with international law. Had petitioner warned them to the contrary, the fatal voyage could have been avoided.

⁶⁴ According to the Coast Guard, Argentina is a participant in AMVER. In 1973, for example, 75 Argentine ships participated in the AMVER System, "Your Key to Safer Seas", U.S.C.G. Pub. 1, 27; 1987 U.S.C.G. AMVER statistics. In the South Atlantic, the AMVER Reporting Station was General Pacheco, a radio station operated for the AMVER system by the Argentine government (A62-69).

its contacts with the United States. This is clearly an act arising out of the liability sued upon, sufficient alone to establish jurisdiction with the forum.⁶⁵

For the first time in this litigation, petitioner challenges service of process.

Petitioner moved to dismiss the complaints of respondents for lack of subject matter jurisdiction and personal jurisdiction pursuant to Fed. R. Civ. P. 12(b) (1) and (2), (A21, A23). No mention was made in the motion of Fed. R. Civ. P. 12(b) (3) and (4), covering insufficiency of process and insufficiency of service of process, or Fed. R. Civ. P. 4, covering service of process. The record on appeal and transcript of oral argument are similarly void of any references by petitioner to service of process or Fed. R. Civ. P. 4. Finally, the "Questions Presented" on the petition for *certiorari* contain no mention of service of process (Pet. App. (i)).⁶⁶ Accordingly, it is clear that petitioner has waived any defenses relating to service of process.

Quite simply, petitioner's objection as to personal jurisdiction is insufficient to cover its arguments with respect to the methods of service of process available to respondents under Fed. R. Civ. P. 4. *International Arbitration Centers Inc. v. Walsh Trucking Co., Inc.*, 82 Civ. 8709 (S.D.N.Y. June 22, 1984) (AVAILABLE ON

⁶⁵ Petitioner owns and operates Empresa Lineas Maritimas Argentinas S.A. ("ELMA"). According to *Lloyd's List*, this state carrier owns 42 vessels which it operates in a liner service to nine U.S. cities on the East Coast, including New York. The Argentine flag carrier operates on a weekly schedule taking delivery of cargo through various newspapers in New York, including the *Journal of Commerce* (See August 15, 1988, listing 363). When ELMA ships call at New York and sail in nearby waters they transmit AMVER messages which are ultimately received at the U.S. Coast Guard AMVER Center at Governor's Island in New York Harbour. The injuries, loss of hire, loss of bunkers purchased in New York, and loss of use of the HERCULES occurred in New York. Additionally, Argentina, through ELMA does business and earns substantial revenue from its "international commerce" in New York. See *In the Matter of Rio Grande Transport*, *supra* at 1161 for a similar contact analysis.

⁶⁶ Petitioner's service of process argument presents questions concerning the availability of FSIA §1608 for service under the Alien Tort Statute which cannot be said to be "fairly included" within the questions presented. Sup. Ct. R. 21. 1(a).

LEXIS; Genfed Library; Dist. file), citing *Harris Corp. v. National Iranian Radio and Television*, 691 F. 2d 1344, 1353 n. 18 (11th Cir. 1982); *Albert Levine Associates v. Hudson*, 43 F.R.D. 392, 393 (S.D.N.Y. 1967); *Melson v. Kroger Co.*, 550 F. Supp. 1100, 1104 n. 2 (S.D. Ohio 1983). "A defense of . . . insufficiency of process . . . or service or process is waived (A) if omitted from a motion in the circumstances described in subdivision (g)." Fed. R. Civ. P. 12(h) (1).

Petitioner's arguments with respect to its "amenability to service" under the Alien Tort Statute (Pet. Br. at 45), are misconceived. Neither service of process objections nor personal jurisdiction objections present questions of judicial authority or competence, *United States v. Morton*, 467 U.S. 822, 828 n.6 (1984). "[R]egardless of the power of the State to serve process an individual may submit to the jurisdiction of the court by appearance, [or] . . . the requirement of personal jurisdiction may be intentionally waived, or for various reasons a defendant may be estopped from raising the issue." *Insurance Corp. of Ireland v. Compagnie Des Bauxites De Guinea*, 456 U.S. 694, 703-704 (1982).

Having failed to object to the federal method of service of process used by respondents, petitioner may not now contend that service was proper only under state procedures and that state personal jurisdiction restrictions apply. Rather, having failed to object to respondents' federal method of service, petitioner must accept that respondents' use of the federal method under 28 U.S.C. §1608 was proper. *Holt v. Kloster Rederi A/S*, 355 F. Supp. 354, 357-358 (W.D. Mich. 1973). This is particularly true because in this case, unlike in *Omni Capital International v. Rudolf Wolf & Co.*, ___ U.S. ___, 108 S.Ct. 404 (1987), petitioner never contended that state personal jurisdiction requirements should be applicable to the suit until after *certiorari* was granted.⁶⁷ Having failed to present these issues concerning service of process or personal jurisdiction below, petitioner is not entitled to have the Court pass upon them.

⁶⁷ Petitioner's brief on appeal before the court of appeals recited that "[s]ervice on Argentina was made in accordance with . . . 28 U.S.C. §1608(a) (3)" without complaint.

Conclusion

The judgment of the court of appeals should be affirmed and the matter remanded to the court of appeals for further proceedings in accordance with the decision of the Court.

Respectfully submitted,

DOUGLAS R. BURNETT
Counsel of Record
RICHARD H. WEBBER
HILL, RIVKINS, CAREY
LOESBERG, O'BRIEN
& MULROY
21 West Street
New York, NY 10006
(212) 825-1000

*Attorneys for Respondent
Amerada Hess Shipping
Corporation*

RAYMOND J. BURKE, JR.
Counsel of Record
FRANCES C. PETERS
BURKE & PARSONS
1114 Avenue of the Americas
New York, NY 10036
(212) 354-3800

*Attorneys for Respondent
United Carriers, Inc.*

Constitution, Treaties, Statutes, and Regulations

Constitutional Provisions Involved

U.S. CONST. art. I, §8, cl. 10

The Congress shall have power . . .

To define and punish Piracies and Felonies committed on the high seas, and Offenses against the Law of Nations;

U.S. CONST. art. III, §2, cl. 1

The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction;

U.S. CONST. amend.V

No person shall be . . . deprived of . . . liberty, or property, without due process of law . . .

Statutes Involved

1. The Alien Tort Statute, 28 U.S.C. §1350 (1982) reads as follows:

§1350. Alien's action for tort

The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

2. The Merchant Marine Act of 1920, 46 U.S.C. § 877, reads in relevant part as follows:

§ 877. Coastwise laws extended to island Territories and possessions

From and after February 1, 1922, the coastwise laws of the United States shall extend to the island Territories and possessions of the United States . . . *And provided further*, That the coastwise laws of the United States shall not extend to the Virgin Islands of the United States until the President of the United States shall, by proclamation, declare that such coastwise laws shall extend to the Virgin Islands and fix a date for the going into effect of same.

3. The Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. §§ 1330, 1332 (a)(2)-(4), 1391(f), 1441(d), 1602-1611 (1982), reads in relevant part as follows:

§ 1330. Actions against foreign states

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

§ 1603. Definitions

For the purpose of this chapter—

....

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

* * * * *

§ 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

§ 1605. General exceptions to the jurisdictional immunity of a foreign state.

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

* * * * *

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment;

Treaties Involved

1. The Geneva Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, reads in relevant parts as follows:

Article 1

The term "high seas" means all parts of the sea that are not included in the territorial sea or in the internal waters of a State.

Article 2

The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty. Freedom of the high seas is exercised under the conditions laid down by these articles and by other rules of international law. It comprises, *inter alia*, both for coastal and non-coastal States:

- (1) Freedom of navigation;
- (2) Freedom of fishing;
- (3) Freedom to lay submarine cables and pipelines;
- (4) Freedom to fly over the high seas.

These freedoms, and others which are recognized by the general principles of international law, shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas.

Article 20

Where the seizure of a ship or aircraft on suspicion of piracy has been effected without adequate grounds, the State making the seizure shall be liable to the State the nationality of which is possessed by the ship or aircraft, for any loss or damage caused by the seizure.

Article 23

1. The hot pursuit of a foreign ship may be undertaken when the competent authorities of the coastal State have good reason to

believe that the ship has violated the laws and regulations of that State. Such pursuit must be commenced when the foreign ship or one of its boats is within the internal waters or the territorial sea or the contiguous zone of the pursuing State, and may only be continued outside the territorial sea or the contiguous zone if the pursuit has not been interrupted. It is not necessary that, at the time when the foreign ship within the territorial sea or the contiguous zone receives the order to stop, the ship giving the order should likewise be within the territorial sea or the contiguous zone. If the foreign ship is within a contiguous zone, as defined in article 24 of the Convention on the Territorial Sea and the Contiguous Zone, the pursuit may only be undertaken if there has been a violation of the rights for the protection of which the zone was established.

2. The right of hot pursuit ceases as soon as the ship pursued enters the territorial sea of its own country or of a third State.

3. Hot pursuit is not deemed to have begun unless the pursuing ship has satisfied itself by such practicable means as may be available that the ship pursued or one of its boats or other craft working as a team and using the ship pursued as a mother ship are within the limits of the territorial sea, or as the case may be within the contiguous zone. The pursuit may only be commenced after a visual or auditory signal to stop has been given at a distance which enables it to be seen or heard by the foreign ship.

4. The right of hot pursuit may be exercised only by warships or military aircraft, or other ships or aircraft on government service specially authorized to that effect.

5. Where hot pursuit is effected by an aircraft:

(a) The provisions of paragraphs 1 to 3 of the present article shall apply *mutatis mutandis*;

(b) The aircraft giving the order to stop must itself actively pursue the ship until a ship or aircraft of the coastal State, summoned by the aircraft, arrives to take over the pursuit, unless the aircraft is itself able to arrest the ship. It does not suffice to justify an arrest on the high seas that the ship was merely sighted by the aircraft as an offender or suspected offender, if it was not both ordered to stop and pursued by the aircraft itself

or other aircraft or ships which continue the pursuit without interruption.

6. The release of a ship arrested within the jurisdiction of a State and escorted to a port of that State for the purposes of an enquiry before the competent authorities, may not be claimed solely on the ground that the ship, in the course of its voyage, was escorted across a portion of the high seas, if the circumstances rendered this necessary.

7. Where a ship has been stopped or arrested on the high seas in circumstances which do not justify the exercise of the right of hot pursuit, it shall be compensated for any loss or damage that may have been thereby sustained.

2. The Pan-American Convention Relating to Maritime Neutrality, Feb. 20, 1928, 47 Stat. 1989, reads in relevant part as follows:

Art. 3. Belligerent states are obligated to refrain from performing acts of war in neutral waters or other acts which may constitute on the part of the state that tolerates them, a violation of neutrality.

Art. 27. A belligerent shall indemnify the damage caused by its violations of the foregoing provisions. It shall likewise be responsible for the acts of persons who may belong to its armed forces.

3. The Treaty of Friendship, Commerce, and Navigation Between the United States and Liberia, Aug. 8, 1938, 54 Stat. 1739, T.S. No. 956, reads in relevant parts as follows:

ARTICLE I

The nationals of each High Contracting Party shall enjoy freedom of access to the courts of justice of the other on conforming to the local laws, as well as for prosecution as for defense of their rights, and in all degrees of jurisdiction established by law.

• • • •

The nationals of each High Contracting Party shall receive within the territories of the other, upon submitting to conditions imposed upon its nationals, the most constant protection and security for their persons and property, and shall enjoy in this respect

that degree of protection that is required by international law. Their property shall not be taken without due process of law and without payment of just compensation.

* * * *

Article VII

Between the territories of the High Contracting Parties there shall be freedom of commerce and navigation. The nationals of each of the High Contracting Parties equally with those of the most-favored nation, shall have liberty freely to come with their vessels and cargoes to all places, ports and waters of every kind within the territorial limits of the other which are or may be open to foreign commerce and navigation.

4. CONVENTION between Great Britain and Buenos Ayres, for the Settlement of British Claims. Signed at Buenos Ayres, 19th July, 1830.

WHEREAS certain of his Britannic Majesty's subjects have demands pending against the Government of Buenos Ayres, for indemnification for illegal acts and violences, committed by privateers commissioned by them during the late war with the Emperor of Brazil, and whereas for the liquidation of those claims, a Mixed Commission was appointed by the Government of Buenos Ayres, in the month of October last, which commission, after having proceeded to the examination of some cases presented to them, have experienced considerable difficulty in arriving at a determination thereupon; and the Government of Buenos Ayres desiring to give a proof of their disposition to bring these long standing claims to as speedy a settlement as possible, and having consulted with His Britannic Majesty's Charge' d'Affaires thereupon, who has been charged by his Government to promote the adjustment of these cases, they have agreed with the said Charge' d'Affaires upon the following mode of providing for the final settlement of the remaining cases, viz: —

Art. I. The liquidation of the remaining cases of His Britannic Majesty's subjects against the Government of Buenos Ayres, arising out of the acts of their privateers in the late war, shall be removed to London.

II. For the purpose of giving effect to this Article, a new commission shall be named, to consist of 2 individuals, one to be ap-

pointed by the Government of Buenos Ayres, the other to be named by His Britannic Majesty's Government on behalf of the claimants.

III. The said commission shall meet in London in 6 months from this date.

IV. Due notice of the appointment and meeting of the commission shall be given in the London Gazette, and a limited period shall at the same time be fixed for the reception of claims, after the expiration of which no other shall be entertained.

V. With respect to the form in which the said claims shall be proved and substantiated by the parties interested, the commissioners shall guide themselves by the general rules and practice according to the Law of Nations.

VI. So soon as the amount of any claim shall have been determined by the commission, a certificate thereof shall be delivered to the claimant, signed by the commissioners.

* * * *

In virtue of which, and for the corresponding ends, 2 copies of this Convention have been signed and exchanged in Buenos Ayres, this 19th day of July, 1830.

WOODBINE PARISH,

Charge' d'Affaires of His Britannic Majesty.

MANUEL J. GARCIA

Minister of Finance, charged with the Department of Government for Foreign Affairs.

Memorandum annexed to the preceding Convention.

Memorandum of the British Claims against the Government of Buenos Ayres.

The innocent part of the cargo of the *Huskisson*,

	(approximate value)	£.	9068	0	0
Case of the <i>Concord</i>	-	-	-	1064	4 8
<i>Anne</i>	-	-	-	1912	18 10
<i>Albuera</i>	-	-	-	2632	12 0
<i>Hellvellyn</i>	-	-	-	2227	1 8
<i>George and James</i>	-	-	-	3821	18 8

Mr. Carvallio's claim, 1351 milreis	-	about	304	0	0
Total approximate amount in sterling,	-	£	21,030	15	5

WOODBINE PARISH.
MANUEL J. GARCIA.

Foreign Law Involved

1. Article 31 of the Constitution of the Argentine Republic

This Constitution, the Laws of Nation which are a consequence of that dictated by the Congress and the Treaties with foreign plenipotentiaries are the supreme law of the nation; and the authorities of each province are obligated to confirm to this law, notwithstanding any other disposition to the contrary which is contained in the provincial laws and constitutions.

2. Argentine Decree of November 4, 1828

With the object of satisfying the claims that have been made and will be made in the future by the nationals or subjects of friendly or neutral powers, about illegal acts committed by the corsairs of the Republic during the war with the Empire of Brazil, the Government has agreed and decreed:

Article 1 - A commission composed of three individuals will be named by the Minister of External Relations, that will become acquainted with the claims and settle the accounts that arise against the shipowners of the privateers for illegal acts committed during its cruise.

Article 2 - The settlements carried out by the commission will be taken to the Government for the corresponding resolution.

3. Spanish Corsair Ordinance of 1801

Article 21 - They will be allowed to navigate freely and without the least detention, the vessels whose captains present in good faith all their papers, and let it be known through them the neutral ownership of the same and of its cargo, even though they are destined for enemy ports, on the condition that these not be blockaded and they do not carry prohibited goods or are reputed to carry contraband, and on the condition that the enemy observe the same conduct with the neutral ships and goods.

Article 22 - If in these and other cases the vessels belong to my vassals, or allied and neutral nations were detained, and led to ports different from their destination against the expressed rules, and without having given them just cause for their courses, papers, resistance, suspicious flights, quality of their cargo and other legitimate reasons founded on treaties and general customs of the Nations, the privateers that caused the detention will be condemned to pay the demurrage and all the damages, injuries and costs caused by the detained vessel, in adjustment with Articles 14 and 15 of this Ordinance, and if the vessels whose damages they caused were from my fleet, the Juntas or naval judges will give an immediate account with justification and their judgment, through the Secretary of their office so that I may resolve the compensation and the rest that corresponds in order to correct the damages and to avoid it in the future.

4. Argentine Provisional Regulation For Privateering of 1817

Article 8 - All prizes will be sent to the port of the State to be judged through legal procedures in use in similar cases; but if an extraordinary circumstance occurred which would impede it, the commander of the privateer will use his discretionary judgment (arbitration) deliberating its security, and keeping the justifying documents, that he will present in time to the competent tribunal.

Article 19 - Not a legitimate prize being the result of the sentence of said tribunal, or not having the space for its detention, it will be freed incontinenti causing it the least expenditure, not even with respect to port duties. And if under this or other pretext it were detained any longer, the one causing this delay will be responsible for the damages and injuries that result to the owners.

Article 44 - If the detained vessel were not determined judicially to be a good prize, its possession will be immediately reestablished to the captain or owner, with its officers and crew, to which everything that belongs to them will be restored without retaining the least thing. It will be provided convenient safe conduct so that without further delay it continue its voyage without forcing it to pay port duties; and on the contrary before its exit from port they will be satisfied by the privateer the expenditures, damages and injuries caused them, and will claim in justice if they find themselves comprised in the anticipated cases in Articles 22 and

30, but there will not be such claim if said vessel had given just motive for suspicion or others declared in these regulations, and through which proceedings would have been established, what should precisely be on record from the proceedings which have been followed and in its consequence.

10
No. 87-1372

Supreme Court, U.S.

FILED

SEP 29 1988

JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

ARGENTINE REPUBLIC,

Petitioner,

v.

AMERADA HESS SHIPPING CORPORATION AND UNITED
CARRIERS, INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

REPLY BRIEF OF THE PETITIONER

BRUNO A. RISTAU
Counsel of Record
JOEL E. LEISING
KAPLAN RUSSIN & VECCHI
1215 Seventeenth St., N.W.
Washington, D.C. 20036
(202) 887-0353

Attorneys for the Petitioner

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Respondents.

**ON WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SECOND
CIRCUIT**

REPLY BRIEF FOR THE PETITIONER

INTRODUCTION

Both in the district court and in the court of appeals, respondents relied almost exclusively on the Alien Tort Statute as a jurisdictional predicate for their suits.¹ They urged that a literal reading of the

¹ In their statutory notices of suit delivered to the petitioner, both respondents advised the Argentine Minister of Foreign Affairs that "it is the position of plaintiff . . . that the Foreign Sovereign Immunities Act of 1976 is inapplicable to the action described herein, which arises under the Alien Tort Claims Act, 28 U.S.C. § 1350 (1982)." Pet. App. 38a, 41a.

Statute provided a remedy in tort against the petitioner for the property damages occasioned by the attack on the *HERCULES*. In their brief, in this Court, respondents now contend for the first time that the Alien Tort Statute should be interpreted to provide to aliens an independent maritime remedy against foreign sovereigns for the unlawful taking of a prize (Resp.Br. at 18-26). If the Statute does not provide such a remedy, they argue in the alternative that the general admiralty and maritime jurisdiction of federal courts furnishes an established basis for the maintenance of their suits. They devote a major part of their brief to this new thesis (*id.* at 26-50), and several of respondents' *amici* support that view.²

Finally, respondents argue that jurisdiction against the petitioner will lie under the tort exception to sovereign immunity contained in the Foreign Sovereign Immunities Act ("FSIA"), because the claimed wrongful conduct of the petitioner occurred "in the United States." (*id.* at 50-54).

We address these contentions below. We shall not burden this reply with a repetition of our challenge to the court of appeals' holding that the Alien Tort Statute provides a basis, independent of the jurisdictional provisions of the FSIA, for tort suits against foreign states for violations of international law.³

² Brief *amicus curiae* by the Maritime Law Association at 12-14; Brief *amicus curiae* by the Republic of Liberia at 15-17.

³ With respect to the historical antecedents of the Alien Tort Statute we respectfully refer the Court to a recent scholarly article by Anne-Marie Burley of the Harvard Law School, submitted for publication in the *American Journal of International Law*, entitled *The Alien Tort Statute and the Judiciary Act of*

I. THE FOREIGN SOVEREIGN IMMUNITIES ACT PREEMPTS THE DISTRICT COURTS' JURISDICTION IN ADMIRALTY, MARITIME AND PRIZE CASES

A. The Alien Tort Statute Does Not Provide Aliens with a Special Admiralty Remedy

Respondents' contention that the Alien Tort clause contained in Section 9 of the First Judiciary Act, 1 Stat. 77, was designed to provide to aliens an independent maritime remedy against foreign sovereigns for violations of international law is based on a series of disoriented premises:

1. In Oliver Ellsworth's handwritten notes of an early draft of what became section 9 of the First Judiciary Act, the Alien Tort clause immediately followed the clause which conferred on the district courts original and exclusive jurisdiction in admiralty and maritime cases (Resp.Br. at 19).⁴

2. In 1789, torts in violation of the law of nations consisted mainly of prizes captured at sea by privateers or by public armed ships, and the Alien Tort Statute was meant to assure to aliens a forum for improper captures at sea (*ibid.*).

1789: *A Badge of Honor*. Petitioner has lodged copies of the article with the Clerk of the Court and has furnished copies to the respondents and *amici*.

⁴ As enacted, Section 9 separated the clause conferring original and exclusive admiralty and maritime jurisdiction on the newly-established district courts from the Alien Tort clause. Congress inserted between these two provisions a clause conferring exclusive jurisdiction on district courts over all seizures on land and non-navigable waters and of all suits for penalties and forfeitures incurred under the laws of the United States. 1 Stat. 77.

3. Blackstone's *Commentaries* stated that an improper capture of a prize is civilly actionable (Resp.Br. at 20).

4. Blackstone listed as the three principal offenses against the law of nations violations of safe conduct, infringement of the rights of ambassadors, and piracy (*ibid.*).

Based on these premises, respondents urge that petitioner's "unjustified attack on a neutral vessel on the high seas, after notice of its route of innocent passage" constituted a violation of an implied safe conduct against the law of nations as that law had developed in 1789. They add that "since only sovereigns possessed navies and commissioned privateers, they must have been regarded as logical defendants under the Alien Tort Statute" (*id.* at 21).

Elsewhere, respondents suggest that the petitioner has committed an act of piracy—another of the offenses listed by Blackstone—because petitioner has failed to compensate the respondents for their claimed losses (*ibid.*).

None of these premises support respondents' conclusion that the 200-year old Alien Tort Statute was designed to provide aliens an *in personam* admiralty remedy against foreign sovereigns for claimed violations of the law of nations—the remedy which respondents seek here.

First, section 9 of the First Judiciary Act conferred exclusive, original jurisdiction "of all civil causes of admiralty and maritime jurisdiction" on the district courts, whereas the district courts' jurisdiction under the Alien Tort Statute was concurrent with that of the state courts. It does not appear logical that Con-

gress would in one clause confer exclusive original jurisdiction on the federal courts in *all* admiralty and maritime matters, and two sentences later confer concurrent jurisdiction on state courts in *some* admiralty and maritime matters.

Second, respondents' reliance on principles of prize law is misplaced, since prize jurisdiction proceeds *in rem*. *Cushing v. Laird*, 107 U.S. 69, 80 (1882); *Jennings v. Carson*, 8 U.S. (4 Cranch) 2,23 (1807). The question prize courts have to determine is that of "prize or no prize." See also 7 G. Hackworth, *Digest of International Law* 30 (1943).⁵ The suits here are *in personam* actions against the petitioner.

It was established common law doctrine at the time of the passage of the First Judiciary Act that no personal action could be maintained against a foreign sovereign. As the Court said in *The Santissima Trin-*

⁵ The cases cited by respondents are not to the contrary: in *Del Col v. Arnold*, 3 U.S. (3 Dall) 333 (1796), by agreement of the parties, a vessel taken as a prize was sold; the proceeds were paid into court; and the court adjudicated the rights of the parties to the sum of money. *The Amiable Nancy*, 16 U.S. (3 Wheat.) 546 (1818), was a libel by the former owners of a neutral vessel against the owners of an American privateer that had plundered the neutral vessel and carried off its papers. The vessel was subsequently seized by a British cruiser, detained for want of papers, and thereafter condemned as a lawful prize. Justice Story held that the district court had jurisdiction by virtue of its general admiralty and maritime jurisdiction, to hear the case against the owners of the privateer "of gross and wanton outrage, without any just provocation or excuse. Under such circumstances, the honour of the country, and the duty of the court, equally require that a just compensation should be made to the unoffending neutrals." 16 U.S. at 550.

idad, 20 U.S. (7 Wheat.) 283, 353 (1822): "a foreign sovereign cannot be compelled to appear in our Courts, or be made liable to their judgment, so long as he remains in his own dominions, for the sovereignty of each is bounded by territorial limits."

The Court distinguished an *in rem* action in prize, saying: "prize property which a [foreign public vessel] brings into our ports is liable to the jurisdiction of our Courts, for the purpose of examination and inquiry, and if a proper case be made out, for restitution to those whose possession has been divested by a violation of our neutrality; and if the goods are landed from a public ship in our ports, by the express permission of our government, that does not vary the case, since it invokes no pledge that if illegally captured they shall be exempted from the ordinary operation of our laws." 20 U.S. at 354.

Third, the suggestions that the claimed unprovoked attack on the *HERCULES* by aircraft of the Argentine Air Force was akin to an act of piracy and constituted a violation of an implied safe conduct border on the frivolous.

Both under international law⁶ and the domestic

⁶ See I. Brownlie, *Principles of Public International Law* 244 (3d ed. 1979):

The essential feature of the definition [of piracy] is that the acts must be committed for private ends. It follows that piracy cannot be committed by warships or other government ships, or government aircraft, except where the crew "has mutinied and taken control of the ship or aircraft." (Citations omitted).

See also the 1958 Geneva Convention on the High Seas, Ar-

law⁷ of the United States, actions taken by military aircraft on the high seas, acting on government orders in the course of an armed conflict are not, and never have been, regarded as piratical acts.

B. The General Admiralty and Maritime Jurisdiction Exercised by Federal Courts Does Not Provide a Basis for Suits Against Foreign States for Claimed Violations of International Law

Section 1605(b) of the FSIA establishes a special regime for civil admiralty and maritime claims against foreign states.⁸ The Act permits only *in personam*

titles 15, 16; *Restatement (Third) Foreign Relations Law of the United States* § 522, comment e (1987):

Not every act of violence committed on the high seas is piracy under international law. Only the following acts are considered piratical:

(i) Any illegal acts of violence, detention, or depredation committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed against another ship or aircraft on the high seas, or against persons or property on board such other ship or aircraft; or against a ship, aircraft, persons, or property in a place outside the jurisdiction of any state;

(ii) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft; . . . (emphasis added).

⁷ See 18 U.S.C. §§ 1651-1653.

⁸ Section 1605(b) provides in relevant part as follows:

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial

suits to enforce a maritime lien against a vessel or cargo of a foreign state, and only if the lien is based upon a commercial activity of the foreign state and if proper statutory notice is given. The FSIA thus converts the maritime lien into a personal claim against the responsible foreign state.⁹

Federal courts have uniformly interpreted and applied this provision consistently with the Congressional scheme. *See, e.g., Velidor v. L/P/G Benghazi*, 653 F.2d 812, 821 (3d Cir. 1981), *cert. denied*, 455 U.S. 929 (1982); *Castillo v. Shipping Corp. of India*,

activity of the foreign state: *Provided, That—*

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; . . . and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days. . . .

Whenever notice is delivered under subsection (b)(1) of this section, the maritime lien shall thereafter be deemed to be an in personam claim against the foreign state which at that time owns the vessel or cargo involved: *Provided, That* a court may not award judgment against the foreign state or cargo upon which the maritime lien arose, such value to be determined as of the time notice is served under subsection (b)(1) of this section.

⁹ In two limited respects the enforcement of maritime liens continues to be treated as if it were an *in rem* proceeding against the vessel: jurisdiction still depends on finding the vessel or cargo within the district where the district court sits, and recovery is limited to the value of the vessel or cargo. *See also* H.R. Rep. 94-1487 at 21-22.

606 F.Supp. 497, 502-03 (S.D.N.Y. 1985); *China Nat'l Chem. Corp. v. M/V Lago Haulaihue*, 504 F.Supp. 684, 689-90 (D.Md. 1981).

In enacting section 1605(b), Congress exercised its unquestioned power under the admiralty and maritime clause of Art. III of the Constitution (Sec. 2, cl. 1) to establish the substantive and procedural law to be applied by federal courts sitting in admiralty.

The law administered by federal courts in admiralty is therefore an amalgam of the general maritime law insofar as it is acceptable to the courts, modifications of that law by congressional amendment, the common law of torts and contracts as modified to the extent constitutionally possible by state legislation, and international prize law. *This body of law is at all times subject to modification by the paramount authority of Congress acting in pursuance of its powers under the admiralty and maritime clause and the necessary and proper clause and, no doubt, the commerce clause*, now that the Court's interpretation of that clause has become so expansive. Of this power there has been uniform agreement among the Justices of the Court. (Footnotes omitted, emphasis added).

The Constitution of the United States of America, Analysis and Interpretation, S.Doc. No. 99-16, 99th Cong., 1st Sess. at 743 (1987).

Respondents, however, maintain that the district court should have disregarded the FSIA's special admiralty provision and should have exercised its general admiralty and maritime jurisdiction to hear their

claims; they say (Resp.Br. at 26) that the right of an innocent neutral at sea to be free from unprovoked attack, and to seek and receive compensation for violation of that right, "is a universally accepted rule of law." *Amicus* Maritime Law Association even goes so far as to suggest that Congress lacked power to prohibit the assertion of maritime torts against foreign states from the admiralty jurisdiction in enacting the FSIA, and that if section 1605(b) of the FSIA means what it says, it is unconstitutional (Brief *amicus curiae* by the Maritime Law Association at 13). The *amicus* avoids informing the Court that a similar constitutional challenge to the FSIA's curtailment of traditional admiralty remedies against private parties was summarily rejected by the Second Circuit in *O'Connell Machinery Co. v. M.V. Americana*, 734 F.2d 115 (2d Cir. 1984), *cert. denied*, 469 U.S. 1086 (1984):

This argument founders on several grounds. In the first place, at the time the Constitution was adopted, foreign governments played little or no role in the merchant marine. *Berizzi Brothers Co. v. Steamship Pesaro*, 271 U.S. 562, 573, 46 S.Ct. 611, 612, 70 L.Ed. 1088 (1926). When foreign governments began to operate ships for purposes of trade, the Supreme Court held in *Berizzi*, a seminal decision, that such ships were immune from arrest. *Id.* at 574, However, while the FSIA undoubtedly altered the rights of libelants as they preexisted the Act, it did not alter them as they preexisted the Constitution.

In the second place, the argument that the framers of the Constitution intended to pre-

serve inviolate all the then existing substantive maritime rights has long since been rejected by the Supreme Court. "When the Constitution was adopted, the existing maritime law became the law of the United States 'subject to power in Congress to modify or supplement it as experience or changing conditions might require.'" *Detroit Trust Co. v. The Thomas Barlum*, 293 U.S. 21 (1934) . . . (quoting *Panama Railroad Co. v. Johnson*, 264 U.S. 375, 386, (1924)); . . . [further citations omitted.] Congress did no more than exercise this power when it enacted section 1605(b).

Respondents' contention that the general admiralty and maritime law as applied by federal courts grants them a remedy against the petitioner under the circumstances of this case does not, therefore, bear scrutiny.¹⁰

¹⁰ Respondents can derive no support from language contained in a Congressional report on the 1973 version of the FSIA in regard to suits in admiralty against foreign states (Resp.Br. at 49).

The earlier version of the proposed FSIA contained no special admiralty and maritime provision. More importantly, the legislative history of the 1976 FSIA expressly states:

The committee wishes to emphasize that this section-by-section analysis supersedes the section-by-section analysis that accompanied the earlier version of the bill in the 93rd Congress (that is, S. 566 and H.R. 3493, 93th Cong., 1st sess.); the prior analysis should not be consulted in interpreting the current bill and its provisions, and no inferences should be drawn from differences between the two.

II. THE FOREIGN SOVEREIGN IMMUNITIES ACT DOES NOT PERMIT THE MAINTENANCE OF A TORT SUIT AGAINST A FOREIGN STATE WHERE THE ALLEGED WRONGFUL ACT OCCURRED OUTSIDE THE TERRITORIAL JURISDICTION OF THE UNITED STATES

Respondents seek to avoid the FSIA's (section 1604's) bar to suits against foreign states for torts occurring outside the United States by asserting disingenuously that the attack on the HERCULES occurred "in the United States" (Resp.Br. at 50-51). They reason that—

- 1) the definition section of the FSIA, 28 U.S.C. § 1603(c), defines "United States" as including all "territory and waters, continental and insular, *subject to the jurisdiction of the United States*" (Resp.Br. at 50; respondents' emphasis);
- 2) since petitioner's claimed wrongful acts occurred on the high seas—an area within the acknowledged admiralty and maritime jurisdiction of federal courts—the claimed wrongful acts occurred in "waters subject to the jurisdiction of the United States";
- 3) therefore, "by statutory definition" (*ibid.*), the tortious attack on the HERCULES took place "in the United States."

Based on this logic, respondents urge that the district court was competent to hear their tort claims against the petitioner under Section 1605(a)(5) of the FSIA, which denies immunity to a foreign state for property losses occurring "in the United States" that are caused by the tortious acts of a foreign state.

The minor premise of respondents' syllogism is plainly invalid.

In signifying the territorial reach of the FSIA, Congress employed in section 1603(c) language customarily used to manifest the Congressional intent that the statute should be effective in places where the United States exercises sovereignty.¹¹ For example, the modifying phrase "continental or insular" has been repeatedly interpreted to restrict the definition of "United States" to the continental United States, and to such islands as are part of the United States or its possessions; otherwise, the modifying phrase would be surplusage. See *Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 840 (D.C.Cir. 1984), *cert. denied*, 469 U.S. 881 (1984) (although the United States exercises administrative control within its embassies, embassies are not "... in territory ... subject to the jurisdiction of the United States" for purposes of a tort suit under the FSIA); *McKeel v. Islamic Republic of Iran*, 722 F.2d 582, 588-89 (9th Cir. 1983), *cert. denied*, 469 U.S. 880 (1984) (same holding).

Similarly, the term "waters" in the definition section does not cover all waters that may be subject to any form of judicial or administrative jurisdiction by the United States.¹² Rather, the scope of the term

¹¹ The definition of the term "United States" in § 1603(c) of FSIA is copied almost verbatim from the Immigration and Nationality Act; 8 U.S.C. § 1185(d) reads as follows:

The term "United States" as used in this section includes the Canal Zone, and all territory and waters, continental and insular, subject to the jurisdiction of the United States.

¹² *Perez v. Bahamas*, 482 F.Supp. 1208, 1300 (D.D.C. 1980), *aff'd*, 652 F.2d 186, 189 (D.C.Cir. 1981), *cert. denied*, 454 U.S. 880 (1981), is the only case where the argument was made, and

"waters . . . subject to the jurisdiction of the United States" is limited to the internal and territorial waters that are subject to the sovereignty of the United States. Without any support in the statute or in its legislative history, respondents suggest that the term "*jurisdiction of the United States*" in section 1603(c) is synonymous with "*jurisdiction of United States courts*." It plainly is not.

Moreover, Congress knows how to embrace the high seas within the reach of a jurisdictional statute if it intends to do so.¹³ The established rule is that absent a clear manifestation by Congress to the contrary, statutes have only territorial effect. *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982); *Lauritzen v. Larsen*,

rejected, that the term "waters" in the FSIA's definition section includes waters subject to the special maritime jurisdiction or the exclusive fisheries jurisdiction of the United States.

¹³ See, e.g., 14 U.S.C. § 89(a), empowering the Coast Guard to search and seize vessels "*upon the high seas and waters over which the United States has jurisdiction*" (emphasis added), for the prevention, detection, and suppression of violations of the laws of the United States.

The "special maritime and territorial jurisdiction of the United States" as defined in the Federal Criminal Code, 18 U.S.C. § 7, extends to United States vessels on "[T]he high seas, any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular state, . . ." (para.(1)), and to any United States aircraft (para. (2)) while such aircraft is in flight over *the high seas*. . ." (emphasis added) See also *United States v. Holmes*, 18 U.S. (5 Wheat.) 412 (1820) (statute extends to high seas but does not cover foreign vessels).

The Anti-Smuggling Act, 19 U.S.C. § 1701, permits the President to declare portions of *the high seas* to be customs enforcement areas.

345 U.S. 571, 578 (1953); *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949).

Finally, it is also worthy of note that section 1604 of the FSIA makes it clear that the immunity enjoyed by a foreign state is to be interpreted according to any international agreements "to which the United States [was] a party at the time of enacting the Act." At the time of its enactment in 1976, the United States was a party to the 1958 Convention on the Territorial Sea and Contiguous Zone, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205,¹⁴ and to the 1958 Convention on the High Seas, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82,¹⁵ both of which deny to states the right to exercise sovereignty over the high seas. There is nothing in the legislative history of the FSIA indicating that Congress intended to disregard these treaty commitments.

In consequence, there is no merit in respondents' contention that section 1605(a)(5) of the FSIA provides an alternative jurisdictional basis for these tort suits against the petitioner. As the FSIA and its legislative history make clear, section 1605(a)(5)'s tort exception to sovereign immunity applies only if the wrongful act or omission of a foreign state "occur[s]"

¹⁴ Art. 24 of the Convention provides that a coastal state may exercise control over an area contiguous to its territorial sea but not extending 12 miles from its coast for the purpose of preventing and punishing infringements of its customs, fiscal, immigration and sanitary regulations.

¹⁵ Art. 1 of that Convention defines "high seas" as "all parts of the seas that are not included in the territorial sea or in the inland waters of a State." Art. 2 states in relevant part: "The high seas being open to all nations, no State may validly purport to subject any part of them to their sovereignty."

within the jurisdiction of the United States." H.R. Rep. 94-1487 at 21.

All courts construing this section have consistently held that in order for the tort exception to sovereign immunity to apply, the negligent or wrongful act that caused the injury, as well as the injury itself, must have occurred in the United States. *See Persinger v. Islamic Republic of Iran, supra*; *McKeel v. Islamic Republic of Iran, supra*; *Perez v. Bahamas, supra*; Brief of the United States as *amicus curiae* at 11-12, and cases there cited. In this case, the claimed wrongful acts occurred in the South Atlantic, thousands of miles from the territorial waters of the United States, and are demonstrably beyond the reach of section 1605's tort claims exception.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

BRUNO A. RISTAU

Counsel of Record

JOEL E. LEISING

KAPLAN RUSSIN & VECCHI

1215 Seventeenth Street, N.W.

Washington, D.C. 20036

(202) 887-0353

Attorneys for the Petitioner

September 1988.

(1)
No. 87-1372

Supreme Court, U.S.
FILED
JUN 30 1988

JOSEPH F. SPANIOLO, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1987

ARGENTINE REPUBLIC, PETITIONER

v.

AMERADA HESS SHIPPING CORPORATION, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE
SUPPORTING PETITIONER

CHARLES FRIED

Solicitor General

JOHN R. BOLTON

Assistant Attorney General

LOUIS R. COHEN

Deputy Solicitor General

EDWIN S. KNEEDLER

Assistant to the Solicitor General

Department of Justice

Washington, D.C. 20530

(202) 633-2217

ABRAHAM D. SOFAER

Legal Adviser

EUGENE PINKELMANN

Attorney

Department of State

Washington, D.C. 20520

QUESTION PRESENTED

The United States will address the following question:

Whether a federal district court has jurisdiction under the Alien Tort Statute, 28 U.S.C. 1350, over a suit brought by a foreign corporation against a foreign state for a tort allegedly committed on the high seas in violation of international law, where the foreign state is immune from the jurisdiction of the courts of the United States under the Foreign Sovereign Immunities Act of 1976 (FSIA).

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1372

ARGENTINE REPUBLIC, PETITIONER

v.

AMERADA HESS SHIPPING CORPORATION, ET AL.

*ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT*

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE
SUPPORTING PETITIONER**

INTEREST OF THE UNITED STATES

This case presents an important question regarding the scope of the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1330, 1602-1611. The FSIA prescribes the exclusive bases for asserting jurisdiction over a foreign state in the courts of the United States, consistent with what the Executive Branch and Congress found to be the prevailing and appropriate principles of international law and practice. The court of appeals' held in this case that the courts of the United States are open to tort suits by aliens (but not United States citizens) who seek damages for alleged violations of international law by foreign governments, even where the act or omission occurred outside the United States. That holding is inconsistent with the FSIA and international law, and it exposes the United States to reciprocal action by the courts of other Nations. For these reasons, this case implicates the foreign relations of the United States.

STATEMENT

1. Respondent United Carriers, Inc., a Liberian corporation, was the owner of a crude oil tanker named the Hercules. Respondent Amerada Hess Shipping Corporation, also a Liberian corporation, had chartered the Hercules to transport crude oil from Valdez, Alaska, around the southern tip of South America, to an oil refinery in the Virgin Islands. On May 25, 1982, the Hercules began a return voyage, without cargo, from the Virgin Islands to Valdez. At that time, Great Britain and Argentina were at war over the Falkland (Malvinas) Islands. On June 8, 1982, while the Hercules was on the high seas in the South Atlantic, and allegedly outside the "war zones" designated by Argentina and Great Britain,¹ it was attacked by Argentine military aircraft. The decks and hull of the ship were damaged, and an undetonated bomb lodged in her starboard side. Respondent United Carriers decided that it would be too dangerous to attempt to remove the undetonated bomb, and the ship therefore was scuttled off the coast of Brazil. Pet. App. 3a-4a, 27a-28a.

2. Respondents filed suit in the United States District Court for the Southern District of New York seeking money damages from petitioner Argentine Republic for the injuries they sustained as a result of the attack.² Respondents alleged that petitioner's attack on the neutral vessel violated established norms of international law, and they invoked the jurisdiction of the district court under the Alien Tort Statute, 28 U.S.C. 1350, which provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only com-

¹ Our recitation of the district court's reference to "war zones" should not be understood as an endorsement of the view that a Nation has the unfettered right under international law to designate any area of the high seas as such a zone, into which a neutral ship enters only at its own risk. See R. Tucker, *The Law of War and Neutrality at Sea* 156 n.16, 301-303 (Naval War College 1955); International Military Tribunal, Nuremberg, *In Trial of Admiral Dönitz*, reprinted in W. Bishop, *International Law, Cases and Materials* 810-812 (1962).

² Respondent United Carriers sought \$10 million in damages for the loss of the ship, and respondent Amerada Hess sought \$1.9 million in damages for the loss of fuel that went down with the ship (Pet. App. 4a).

mitted in violation of the law of nations or a treaty of the United States." Pet. App. 28a, 36a, 38a, 39a, 41a.

The district court dismissed the complaint, holding that respondents' suits are barred by the Foreign Sovereign Immunities Act of 1976 (FSIA).³ See Pet. App. 25a-35a. In enacting the FSIA, Congress rejected the rule of absolute immunity for foreign sovereigns that had been recognized since the earliest days of the Nation (see *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812)), and instead codified the "restrictive" theory of sovereign immunity that was followed by many other Nations and had been adopted by the Executive Branch in 1952 in the so-called Tate Letter. Under that theory, a foreign state is immune from suit based on its sovereign or public acts, but not its commercial or private acts. 28 U.S.C. 1602; see *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486-489 (1983); H.R. Rep. 94-1487, 94th Cong., 2d Sess. 8-9, 14 (1976); S. Rep. 94-1310, 94th Cong., 2d Sess. 9, 10 (1976).

In the district court's view, Congress was "emphatic" in its purpose that "the FSIA be the sole means of assessing claims of immunity" by a foreign state (Pet. App. 29a). The court found this congressional purpose "apparent" from the text of the Act, which provides that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter" (*ibid.* (quoting 28 U.S.C. 1604)), and from the legislative history (Pet. App. 29a). The court concluded that "[respondents'] claims undeniably fall outside of the exceptions to blanket foreign sovereign immunity provided by the FSIA" (*id.* at 30a), because in order for a foreign state to be denied immunity from a suit sounding in tort, the FSIA "requires that the 'damage to or loss of property' occur 'in the United States'" (*ibid.*, quoting 28 U.S.C. 1605(a)(5)); yet in this case, respondents "can claim no loss whatsoever occurring in the United States" (Pet. App. 30a).

The district court also rejected respondents' contention that the Alien Tort Statute "provides the basis for jurisdiction that

³ Pub. L. No. 94-583, 90 Stat. 2891, codified at 28 U.S.C. 1330, 1391(f), 1441(d) and 1602-1611.

the FSIA denies" (Pet. App. 31a). The court noted that "[n]o case law supports the assertion that a foreign sovereign state would not have enjoyed immunity in 1789," when the Alien Tort Statute was enacted (*id.* at 31a-32a). But the court held that even if a foreign sovereign at one time might have been sued under the Alien Tort Statute, the FSIA now confers immunity on a foreign state unless the suit falls within one of the exceptions to immunity specified in the FSIA itself (*ibid.*).

3. a. A divided panel of the court of appeals reversed and remanded (Pet. App. 1a-21a). The court of appeals held that the district court has jurisdiction under the Alien Tort Statute (*id.* at 7a-10a), because the suit is brought by aliens (the respondent Liberian corporations), it sounds in tort ("the bombing of a ship without justification"), and it alleges a violation of international law ("attacking a neutral ship in international waters, without proper cause for suspicion or investigation" ⁴) (*id.* at 7a-8a).

⁴ In finding that the alleged attack violated international law (see Pet. App. 5a-7a), the court of appeals relied, *inter alia*, on the Geneva Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, and the 1982 United Nations Convention on the Law of the Sea (Pet. App. 6a). Although the 1958 Convention codifies such long-recognized customary principles as the freedom of navigation on the high seas, it is oriented toward peacetime. So, too, is the 1982 Convention, which the United States has not signed and is not yet in force, but which the United States considers reflective of customary international law in its navigational provisions. While peacetime concepts and principles do not become wholly irrelevant in time of war, neither the 1958 nor the 1982 Convention was negotiated with a view toward wartime, and they do not in fact address the separate, specialized body of rules on the use of force at sea in time of war. (We have been informed by the Department of State that any contrary inference regarding the content of the 1958 Convention that might be drawn from the United States' brief as *amicus curiae* in the court of appeals (at 10 n. 5) is due to the inadvertent omission of the word "respectively" at the end of the first line of that note.) Sources of international law that are more relevant to the use of military force in time of war are addressed at note 27, *infra*. For examples of the distinction between the bodies of international law of the sea that govern peacetime and those that govern wartime, see C. Colombos, *The International Law of the Sea* (6th rev. ed. 1967), which is divided into Part I (The International Law of the Sea in Time of Peace) and Part II (The International Law of the Sea in Time of War), and Naval Warfare Publication 9, *The Commander's Handbook on the Law of Naval Operations* (1987), which is similarly divided into Part I (Law of Peacetime Naval Operations) and Part II (Law of Naval Warfare).

The court acknowledged petitioner's submission that the Alien Tort Statute provides jurisdiction only over suits against individuals, not sovereign states, since the United States recognized absolute immunity for foreign states when the Statute was enacted in Section 9 of the Judiciary Act of 1789, ch. 20, 1 Stat. 77. But the court found it unnecessary to decide whether a court could have exercised jurisdiction over this case in 1789. In the court's view, the Alien Tort Statute "is no more than a jurisdictional grant based on international law," and "[i]n construing the Alien Tort Statute, 'courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today'" (Pet. App. 8a-9a, quoting *Filartiga v. Pena-Irala*, 630 F.2d 876, 881 (2d Cir. 1980)). Accordingly, the court concluded that it "must look to modern international law to decide whether the statute provides jurisdiction over a foreign sovereign" (Pet. App. 9a). Citing two law review articles, the court believed that under the "modern view," sovereign states should not be accorded immunity from suit for their violations of international law (*ibid.*).

The court rejected Argentina's contention that, regardless of whether the Alien Tort Statute once might have provided a basis for jurisdiction in a case such as this, the FSIA is now the exclusive basis for obtaining jurisdiction over foreign sovereigns (Pet. App. 10a-13a). The court acknowledged the force of the legislative history stating that the FSIA "sets forth the sole and exclusive standards to be used in resolving questions of sovereign immunity" (*id.* at 11a, quoting H.R. Rep. 94-1487, 94th Cong., 2d Sess. 12 (1976)), the Second Circuit's own prior conclusion that the FSIA "insulates foreign states from the exercise of federal jurisdiction, except under the conditions specified in the Act" (Pet. App. 11a, quoting *O'Connell Machinery Co. v. M.V. "Americana"*, 734 F.2d 115, 116 (2d Cir.), cert. denied, 469 U.S. 1086 (1984)), and this Court's "similar views" in *Verlinden* (Pet. App. 11a, citing 461 U.S. at 496-497). But the court chose not to follow those pronouncements here, because it believed that "Congress was not focusing on violations of international law when it enacted the FSIA" and therefore "did not intend to remove existing remedies in

United States courts [under the Alien Tort Statute] for violations of international law of the kind presented here" (Pet. App. 11a).⁵

b. Judge Kearsse dissented (Pet. App. 18a-21a). Judge Kearsse expressed skepticism that the Alien Tort Statute was "intended to allow federal subject-matter jurisdiction to ebb and flow with the vicissitudes of 'evolving standards of international law' " (*id.* at 19a). But however that may be, she concluded that the majority had improperly disregarded the "clearly restrictive provisions" of the FSIA, which were "intended to preempt any other State or Federal law (excluding applicable international agreements) for according immunity to foreign sovereigns" (*ibid.* (quoting H.R. Rep. 94-1487, at 12)).

SUMMARY OF ARGUMENT

A. The Foreign Sovereign Immunities Act of 1976 constitutes the exclusive basis for asserting jurisdiction over a foreign state and for determining whether it is immune from suit. This purpose is manifest in 28 U.S.C. 1602, which states that "[c]laims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter [28 U.S.C. 1602-1611]"; in 28 U.S.C. 1604, which mandates that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter"; and in 28 U.S.C. 1330, which confers subject matter and personal jurisdiction on the district courts in suits against a "foreign state" only when the state is not entitled to immunity under 28 U.S.C. 1605-1607. None of the exceptions to immunity in Sections 1605-1607 applies here. The sole exception for suits sounding in tort, 28 U.S.C. 1605(a)(5), dispenses with immunity only for certain torts that occurred in the United States. Because the alleged attack by petitioner's

⁵ The court also held that the actions of Argentina alleged by respondents were "sufficiently related" to the United States to fall within constitutional limitations on the exercise of personal jurisdiction over a foreign defendant (Pet. App. 14a-15a).

military forces occurred outside the United States, that exception is inapplicable and petitioner is "immune from the jurisdiction of the courts of the United States" (28 U.S.C. 1604), including any jurisdiction conferred by the Alien Tort Statute, 28 U.S.C. 1350.

B. The legislative history confirms that the FSIA "sets forth the sole and exclusive standards to be used in resolving questions of sovereign immunity raised by foreign states"; that "Section 1330 provides a comprehensive jurisdictional scheme in cases involving foreign states"; and that the FSIA "is intended to preempt any other State or Federal law (excluding applicable international agreements) for according immunity to foreign sovereigns." H.R. Rep. 94-1487, at 12-13; S. Rep. 94-1310, at 11-12. This Court, in *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983), and the courts of appeals also have uniformly taken the view that the FSIA is the exclusive basis for resolving questions of jurisdiction and immunity in suits against a foreign state. In addition, the legislative history of the tort exception in Section 1605(a)(5) confirms that Congress intended to permit suits against a foreign state only for certain torts that occur in the United States. There is no indication that Congress intended the exception to apply to an attack by a foreign state's military forces on the high seas in time of war.

C. The court of appeals' rationale for finding jurisdiction over this suit under the Alien Tort Statute, outside the comprehensive framework of the FSIA, is seriously flawed. First, even if there once was a plausible basis for a suit such as this under the Alien Tort Statute prior to 1976 (which there was not), the text and legislative history of the FSIA make clear that it now prescribes the exclusive standards for exercising jurisdiction and determining claims of immunity in suits against foreign states. Second, the court of appeals was mistaken in its premise that Congress was not focusing on violations of international law when it enacted the FSIA (and that the FSIA therefore should not be construed to preclude the hypothetical "existing remedies" for such violations under the Alien Tort Statute): The FSIA contains an exception to the rule of immunity for certain cases involving property taken "in violation of international

law" (28 U.S.C. 1605(a)(3)), and Congress expressly rested the FSIA in part on its constitutional power to define offenses against the "Law of Nations" (U.S. Const. Art. I, § 8, Cl. 10). Third, to permit this suit to proceed would substantially depart from accepted principles of international law and thereby adversely affect the foreign relations of the United States and expose the United States to reciprocal action in other countries. Fourth, there is in any event no basis for the court of appeals' premise that the Alien Tort Statute was intended to provide a basis for a suit against a foreign sovereign in circumstances such as these prior to 1976, because foreign states enjoyed absolute immunity from the time the Alien Tort Statute was enacted in 1789 until 1952, and even after that time they would have been immune from suit based on a military attack on the high seas.

ARGUMENT

RESPONDENTS' SUITS ARE BARRED BY THE FOREIGN SOVEREIGN IMMUNITIES ACT, WHICH PRESCRIBES THE EXCLUSIVE GROUNDS FOR JURISDICTION AND RULES OF IMMUNITY IN SUITS AGAINST A FOREIGN STATE

The text, legislative history and consistent judicial interpretation of the FSIA make clear that it prescribes the exclusive standards for asserting jurisdiction over a foreign state and for determining when a foreign state is immune from suit in United States courts. The FSIA lifts a foreign state's immunity to suits sounding in tort only if they are based on certain acts or omissions occurring in the United States. The court of appeals' holding that the respondent Liberian corporations may invoke the jurisdiction of the United States courts to sue petitioner Argentine Republic for injuries allegedly sustained by their ship as a result of an attack by petitioner's military forces on the high seas in time of war constitutes a radical departure from the rules of sovereign immunity that are prescribed by the FSIA and international law. The proper way for respondents to seek compensation from petitioner is by requesting espousal of their claims by the Government of Liberia through diplomatic channels—the traditional avenue for resolving such claims.

A. THE TEXT AND STRUCTURE OF THE FSIA ESTABLISH THAT IT COMPREHENSIVELY GOVERNS QUESTIONS OF IMMUNITY AND JURISDICTION IN SUITS AGAINST FOREIGN STATES AND UNAMBIGUOUSLY BARS RESPONDENTS' SUITS

"It is well settled that 'the starting point for interpreting a statute is the language of the statute itself.'" *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, No. 86-473 (Dec. 1, 1987), slip op. 5 (quoting *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). That principle has particular force in this case, because the FSIA, as a statute whose purpose is "to prescribe and regulate a portion of the jurisdiction of the federal courts[,] * * * must be construed both with precision and with fidelity to the terms by which Congress has expressed its wishes." *Cheng Fan Kwok v. INS*, 392 U.S. 206, 212 (1968); see also *Heckler v. Edwards*, 465 U.S. 870, 877 (1984). As we shall explain, the text and structure of the FSIA unambiguously foreclose this suit.

1. Section 4(a) of the FSIA added a new Chapter 97 to Title 28 of the United States Code, 28 U.S.C. 1602-1611, which is entitled the "Jurisdictional Immunities of Foreign States." The very fact that Congress devoted an entire chapter of the United States Code to this relatively narrow subject is weighty evidence that Congress did not intend to permit the courts to fashion rules of immunity in a common-law manner by relying on statutory provisions outside of Chapter 97 (such as the Alien Tort Statute) that are not even concerned with the jurisdictional immunities of foreign states. But Congress did not leave this preclusion to inference. In the first section of Chapter 97, which sets forth Congress's findings and declaration of purpose in enacting the FSIA, Congress expressed its determination that "[c]laims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter." 28 U.S.C. 1602.

Consistent with this determination, Section 1604 establishes a universal rule that all foreign states are entitled to sovereign

immunity in the United States in all circumstances, save only as exceptions to that rule are set forth in the FSIA itself.⁶ Section 1604 provides that "[s]ubject to existing international agreements to which the United States [was] a party at the time of enactment of this Act[,] a foreign state *shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter*" (emphasis added). Section 1605 in turn specifies in detail the exceptions to this general rule of immunity, which apply to discrete categories of cases involving waivers of immunity, commercial activities, property in the United States, certain torts occurring in the United States, and maritime liens; Section 1606 prescribes the extent of a foreign state's liability when it is not entitled to immunity; and Section 1607 permits certain counterclaims against a foreign state.⁷

⁶ The term "foreign state" is defined (except as used in Section 1608) to include a political subdivision and an agency or instrumentality of the state (28 U.S.C. 1603(a) and (b)).

⁷ Section 1604 provides that the general rule of immunity it prescribes is "[s]ubject to existing international agreements to which the United States [was] a party at the time of enactment of [the FSIA] * * *." This exception has no relevance here. It applies only if the international agreement addresses amenability to suit and directly conflicts with the immunity provisions of the FSIA (H.R. Rep. 94-1487, at 10, 17-18; S. Rep. 94-1310, at 6, 17). Respondents cite (Br. in Opp. 2-3) Articles 5 and 7 of the Geneva Convention on the High Seas, Apr. 29, 1958 (see note 4, *supra*) and Articles I and IV of the Pan-American Convention Relating to Maritime Neutrality, Feb. 20, 1928, 47 Stat. 1990, 1991. However, those Conventions merely establish certain substantive rules of conduct and state that compensation shall be paid for certain wrongs. They do not purport to create a private right of action to recover compensation, and thus are not self-executing in this respect (cf. *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829); *Head Money Cases*, 112 U.S. 580, 598-599 (1884)), and they do not address the question of one sovereign state's immunity to the jurisdiction of the courts of another sovereign state. Moreover, although the United States is a party to both conventions, Argentina is merely a signatory. Section 1604 was not intended to dispense with the immunity of a foreign state based on an "agreement" to which it is not a party. Respondents also err in relying (Br. in Opp. 3-4) on Article I of the Treaty of Friendship, Commerce and Navigation, Aug. 8, 1938, United States-Liberia, 54 Stat. 1740, which, *inter alia*, provides that the nationals of each party "shall

Sections 1604 to 1607 thus prescribe what Section 1602 presages: a comprehensive, self-contained statutory scheme for determining when a foreign state is entitled to sovereign immunity. Compare *United States v. Fausto*, No. 86-595 (Jan. 25, 1988), slip op. 4-8, 14. If none of the exceptions in Sections 1605 to 1607 is applicable, then the "foreign state shall be immune from the jurisdiction of the courts of the United States and of the States" (28 U.S.C. 1604). This language is unequivocal. Cf. *Honig v. Doe*, No. 86-728 (Jan. 20, 1988), slip op. 16. Accordingly, if a plaintiff attempts to invoke the jurisdiction of a federal district court under the Alien Tort Statute (or any other jurisdictional provision) in order to sue a foreign state, Section 1604 expressly renders the foreign state "immune" from that "jurisdiction" unless one of the exceptions in the FSIA itself applies.

It is clear in this case that 28 U.S.C. 1604 renders petitioner Argentine Republic immune from the jurisdiction of the district court, because, as that court held (Pet. App. 30a-31a), none of the exceptions to the general rule of immunity applies. There is only one exception in the FSIA that permits suits sounding in tort, and that exception is limited to actions "in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property *occurring in the United States* and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment" (28 U.S.C. 1605(a)(5) (emphasis added)). As the courts construing Section 1605(a)(5) have consistently recognized,⁸ the legislative history

enjoy freedom of access to the courts of justice of the other on conforming to the local laws * * *." There is no violation of that treaty by the United States here, because the FSIA is one of the "local laws" to which respondents must conform in bringing suit.

⁸ See *Gulf Arab Media-Arab American Film Co. v. Faisal Foundation*, 811 F.2d 1260, 1261, amended, 832 F.2d 132 (9th Cir. 1987); *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 379 (7th Cir. 1985); *Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517, 1524-1525 (D.C. Cir. 1984), cert. denied, 470 U.S. 1051 (1985); *Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 842-843 (D.C. Cir.), cert. denied, 469 U.S. 881 (1984); cf.

makes clear that in order for this exception to apply, the negligent or wrongful act or omission that caused the injury, as well as the injury itself, must have occurred in the United States. See *Verlinden*, 461 U.S. at 488 n.11 (referring to 28 U.S.C. 1605(a)(5) as providing an exception "for certain non-commercial torts within the United States").⁹ In no instance could the tort exception to immunity apply where both the act or omission and the injury occurred outside the United States. Section 1605(a)(5) therefore has no application here, because the alleged attack upon and injury to respondents' ship occurred outside the United States — on the high seas, in the South Atlantic.

Olsen v. Government of Mexico, 729 F.2d 641, 645-646 (9th Cir.), cert. denied, 469 U.S. 917 (1984); *McKeel v. Islamic Republic of Iran*, 722 F.2d 582, 588-590 & n.10 (9th Cir. 1983), cert. denied, 469 U.S. 880 (1984).

⁹ The committee reports state that the tort exception applies only if the act or omission of the foreign state or its officer or employee "occur[red] within the jurisdiction of the United States" (H.R. Rep. 94-1487, at 21; S. Rep. 94-1310, at 20). That also was the contemporaneous view of the responsible Executive Branch officials, who were instrumental in drafting the FSIA. See *Immunities of Foreign States: Hearing on H.R. 3493 Before the Subcomm. on Claims and Governmental Relations of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 34 (1973) [hereinafter 1973 Hearing] (letter from the Attorney General and the Secretary of State) (the exception permits suits for injuries "occasioned by the tortious act in the United States of a foreign state"); *id.* at 42 (the exception applies if the "negligent or wrongful act . . . took place in the United States"); *id.* at 21 (statement of acting Legal Adviser Brower) (same); *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 94th Cong., 2d Sess. 27 (1976) [hereinafter 1976 Hearings] (remarks of Legal Adviser Leigh) (exception for "torts that occur in the United States").

This interpretation is also consistent with the parallel exception in the European Convention on State Immunity, which entered into force on June 11, 1976, while Congress was considering the FSIA, and which was regarded as generally consistent with the FSIA. See 1976 Hearings 37. Article 11 of that Convention provides that a contracting state shall not be immune to actions seeking redress for injury to the person or damage to tangible property "if the facts which occasioned the injury or damage occurred in the territory of the State of the forum" (U.N. Leg. Series, *Materials on Jurisdictional Immunities of States and Their Property* 159 (1982)).

Moreover, the FSIA excludes from the tort exception "any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused." 28 U.S.C. 1605(a)(5)(A). This exclusion has been described as preserving a foreign state's immunity for "acts or omissions of a fundamentally governmental nature." *Olsen v. Government of Mexico*, 729 F.2d 641, 645 (9th Cir. 1984); see also *MacArthur Area Citizens Ass'n v. Republic of Peru*, 809 F.2d 918, 921-923 & n.4 (D.C. Cir. 1987); *Joseph v. Office of Consulate General of Nigeria*, 830 F.2d 1018, 1026-1027 (9th Cir. 1987). It may be difficult in some circumstances to locate the precise dividing line between the kinds of torts for which a foreign state is not entitled to immunity under Section 1605(a)(5) and the acts of a foreign state for which sovereign immunity is preserved by Section 1605(a)(5)(A). In this case, however, we think it clear that an attack by the military forces of one foreign state on a ship registered under the laws of another foreign state that occurred on the high seas in time of war should be regarded by a court of the United States as "discretionary" and of a "fundamentally governmental nature" for purposes of 28 U.S.C. 1605(a)(5)(A). See also pages 18-20, *infra*.

For the foregoing reasons, petitioner is "immune from the jurisdiction of the courts of the United States and of the States" with regard to claims based upon the alleged attack by petitioner's military forces on respondents' ship. 28 U.S.C. 1604.

2. The conclusion that the FSIA is exclusive and that a plaintiff cannot circumvent its carefully drawn limitations by bringing a suit under another jurisdictional statute (such as the Alien Tort Statute) also is evident from the special grant of subject matter jurisdiction in 28 U.S.C. 1330. That provision was added to the Judicial Code by Section 2(a) of the FSIA and is entitled "Actions against foreign states." Section 1330(a) provides that "[t]he district courts shall have original jurisdiction without regard to amount in controversy of *any* nonjury civil action against a foreign state . . . as to *any* claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or

under any applicable international agreement" (emphasis added). Congress's intention to address the question of jurisdiction over suits against foreign states in a comprehensive manner is evident from the fact that Section 1330 draws within the ambit of its concern "any" action against a foreign state with respect to "any" claim for relief, but only permits the district courts to exercise jurisdiction over such actions and claims if the foreign state is not entitled to immunity under 28 U.S.C. 1605-1607.¹⁰

Indeed, precisely because of the all-encompassing scope of the new 28 U.S.C. 1330(a) as regards cases in which a foreign state is a *defendant*, Section 3 of the FSIA amended the diversity statute to delete the references to suits to which a "foreign state" is a party (as either a plaintiff or defendant) (see 28 U.S.C. (1970 ed.) 1332(a)(2) and (3)) and added a new paragraph (4) that preserves a distinct head of diversity jurisdiction over suits involving a foreign state only where it is the *plaintiff* (90 Stat. 2891; see 28 U.S.C. 1332(a)(4)). As the House Report explained, "[s]ince jurisdiction in actions *against* foreign states is comprehensively treated by the new section 1330, a similar jurisdictional basis under section 1332 becomes superfluous" (H.R. Rep. 94-1487, at 14 (emphasis added); accord, S. Rep. 94-1310, at 13 (emphasis added)). There is no reason to believe that Congress intended Section 1330 to be any less "comprehensive[]" in cases involving an alleged violation of the law of nations, or that the Alien Tort Statue would be any less "superfluous" than the diversity statute in those circumstances. Moreover, as a result of the deletion of the references to a "foreign state" in 28 U.S.C. (1970 ed.) 1332(a)(2) and (3), it is clear that a federal court would not have diversity jurisdiction over a suit by a United States citizen against a foreign state based on the attack alleged in this case. It is implausible to suppose that Congress nevertheless intended to permit an alien to bring such a suit under 28 U.S.C. 1350, despite the more attenuated nexus of the suit to the United States.

¹⁰ Although the FSIA contemplates that a suit may be brought against a foreign sovereign in state court, the FSIA guarantees the defendant the right to remove the suit to federal court (28 U.S.C. 1441(d); see *Verlinden*, 461 U.S. at 489).

Sections 1330(a) and 1604 therefore are complementary: Section 1330(a) confers jurisdiction on the district courts whenever the foreign state is *not* entitled to immunity, and Section 1604 bars the district courts from exercising jurisdiction wherever the foreign state *is* entitled to immunity. In this manner, the two provisions occupy the entire fields of foreign sovereign immunity and subject matter jurisdiction over suits against foreign states.¹¹ There is no room in this framework for a court to fashion its own standards of foreign sovereign immunity that depart from those in the FSIA or to exercise subject matter jurisdiction in a suit against a foreign state where jurisdiction does not lie under 28 U.S.C. 1330(a). Accordingly, "[t]he plain meaning of the statute decides the issue presented" (*FERC v. Martin Exploration Management Co.*, No. 87-363 (May 31, 1988), slip op. 3 (quoting *Bethesda Hospital Ass'n v. Bowen*, No. 86-1764 (Apr. 4, 1988), slip op. 4)) and requires dismissal of respondents' suits.

B. THE LEGISLATIVE HISTORY AND CONSISTENT JUDICIAL INTERPRETATION OF THE FSIA STRONGLY REINFORCE THE PLAIN MEANING OF ITS TEXT AND STRUCTURE

1. a. The legislative history of the FSIA overwhelmingly supports the bar to suit that is mandated by the text and structure of the Act. The House and Senate Reports both stress that the FSIA "sets forth the *sole and exclusive standards* to be used

¹¹ Subsection (b) of 28 U.S.C. 1330 provides that "[p]ersonal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have [subject matter] jurisdiction under subsection (a) where service has been made under [28 U.S.C. 1608]." Thus, personal jurisdiction, like subject matter jurisdiction, exists only if one of the exceptions to foreign sovereign immunity in Sections 1605-1607 is applicable (*Verlinden*, 461 U.S. at 485, 489 & n.14). Enforcement of these statutory limitations would render it unnecessary to address petitioner's other objections (Br. 34-48) to the exercise of personal jurisdiction in this case. See H.R. Rep. 94-1487, at 13. This meticulous attention to questions of personal jurisdiction and service of process, as well as venue (28 U.S.C. 1391(f)), removal (28 U.S.C. 1441(d)), and attachment and execution (28 U.S.C. 1609-1611), underscores Congress's intention to enact a comprehensive statutory scheme.

in resolving questions of sovereign immunity raised by foreign states before Federal and State courts in the United States" (H.R. Rep. 94-1487, at 12 (emphasis added); S. Rep. 94-1310, at 11 (emphasis added)). Both Reports also stress that "Section 1330 provides a comprehensive jurisdictional scheme in cases involving foreign states," which is essential because disparate treatment "may have adverse foreign relations consequences" (H.R. Rep. 94-1487, at 12-13; S. Rep. 94-1310, at 12).¹²

Consistent with this "exclusive" and "comprehensive" scope Congress intended for the FSIA, the Reports make clear that the FSIA "is intended to preempt any *other* State or Federal law (excluding applicable international agreements) for according immunity to foreign sovereigns, their political subdivisions, their agencies, and their instrumentalities" (H.R. Rep. 94-1487, at 12 (emphasis added); S. Rep. 94-1310, at 11 (emphasis added)). Thus, even if we assume that the reference to the "law of nations" in the Alien Tort Statute might once have been a source of authority for a court to draw on its own assessment of international law in order to determine whether a foreign state should be accorded immunity to a suit under that Statute, the legislative history confirms that Congress "intended [the FSIA]

¹² The contemporaneous interpretation and implementation of the FSIA by the Department of State also reflects the view that its provisions are exclusive. As required by the section of the FSIA governing service of process, 28 U.S.C. 1608(a), the Department of State promulgated regulations in 1977 (42 Fed. Reg. 6367), which are still in effect (22 C.F.R. Pt. 93), to define the content of the notice of suit that the plaintiff must serve on the foreign state under the Act. Paragraph nine of the required notice states:

Questions relating to state immunities and to the jurisdiction of the United States courts over foreign states are governed by the Foreign Sovereign Immunities Act of 1976, which appears in sections 1330, 1391(f), 1441(d), and 1602 through 1611 of Title 28, United States Code (Pub. L. No. 94-583; 90 Stat. 2891).

Respondents included the quoted paragraph in their notices of suit in this case, but then attempted to qualify it by asserting that "the Foreign Sovereign Immunities Act of 1976 is inapplicable to the action described herein, which arises under the Alien Tort Claims Act, 28 U.S.C. § 1350 (1982)" (Pet. App. 38a, 41a). Petitioners thus sought to take advantage of the special procedures under the FSIA for service of process upon and obtaining personal jurisdiction over a foreign state, while ignoring its rules of immunity and limitations on jurisdiction.

to preempt" that "Federal law" insofar as determinations of immunity are concerned. See pages 23-24 *infra*. This preemptive intent is also reflected in statements that the purpose of the FSIA was to "codify" what Congress deemed to be the proper principles of foreign sovereign immunity (H.R. Rep. 94-1487, at 7; S. Rep. 94-1310, at 7; 1973 *Hearing* 32-33, 39), with the understanding that Congress itself would carve out any additional exceptions that might be indicated by future developments in international law and the practice of other nations (*id.* at 32). Similar points were stressed throughout the legislative history.¹³

¹³ See S. Rep. 94-1310, at 1 (the FSIA "define[s] the jurisdiction of United States courts in suits against foreign states, [and] the circumstances in which foreign states are immune from suit"); *id.* at 8 (the purpose of the FSIA "is to provide when and how parties can maintain a lawsuit against a foreign state or its entities in the courts of the United States and to provide when a foreign state is entitled to sovereign immunity"); *ibid.* (prior to enactment of the FSIA, there were no "comprehensive provisions in our law available to inform parties when they can have recourse to the courts to assert a legal claim against a foreign state" and no "firm standards as to when a foreign state may validly assert the defense of sovereign immunity"); *id.* at 12 (the FSIA "set[s] forth comprehensive rules governing sovereign immunity" and "prescribes . . . the jurisdiction of U.S. district courts in cases involving foreign states"); *id.* at 14 (the FSIA "sets forth the legal standards under which Federal and State courts would henceforth determine all claims of sovereign immunity raised by foreign states"). Accord H.R. Rep. 94-1487, at 1, 6, 7, 14. See also 1976 *Hearings* 58 (statement by a representative of the American Bar Association's International Law Section) ("The bill defines comprehensively the criteria that American courts will apply in determining when a foreign state is subject to suit.").

A passage in the section-by-section analysis submitted with the bill in 1973 stated that the proposed 28 U.S.C. 1330 was not intended to supplant specialized jurisdictional regimes, such as those established by 28 U.S.C. 1333, dealing with admiralty, maritime and prize cases, and by 28 U.S.C. 1338, dealing with patent and copyright cases. 1973 *Hearing* 47; 119 Cong. Rec. 2219 (1973). The 1976 House Report, however, states that the prior section-by-section analysis was superseded by the analysis of the 1976 bill (see H.R. Rep. 94-1487, at 12), which does not contain a similar suggestion that jurisdictional regimes outside of 28 U.S.C. 1330 might remain applicable to suits against foreign states (see H.R. Rep. 94-1487, at 12-14). That omission is attributable to the fact that 28 U.S.C. 1605(b), which was not contained in the 1973 version of the bill that was the subject of the superseded section-by-section analysis (see 1973 *Hearing* 5-6), provides that a foreign state is not immune from an in personam suit in admiralty to enforce a maritime lien against a vessel or cargo.

b. Moreover, the legislative history shows that when Congress enacted the FSIA, it specifically addressed the question of what torts should subject a foreign state to the jurisdiction of the United States courts and chose *not* to exempt from immunity those acts or omissions that occur outside the United States. See pages 11-12, *supra*. In addition, the legislative history confirms Congress's understanding that the FSIA was intended to codify the restrictive theory of sovereign immunity, under which "the immunity of a foreign state is 'restricted' to suits involving a foreign state's public acts (*jure imperii*) and does not extend to suits based on its commercial or private acts (*jure gestionis*)" (H.R. Rep. 94-1487, at 7; S. Rep. 94-1310, at 9; see also 122 Cong. Rec. 33532 (1976) (remarks of Rep. Danielson)). In other words, the rule of immunity was intended to apply, in general terms, "to cases involving acts of a foreign state which are sovereign or governmental in nature, as opposed to acts which are either commercial in nature or those which private persons normally perform" (H.R. Rep. 94-1487, at 14; S. Rep. 94-1310, at 14) and therefore "are governed by private law" (1976 *Hearings* 30).¹⁴ Although there may be some question as to how the "public act"/"private act" distinction identified in the legislative history applies in the specific context of tort claims, it is con-

This provision was intended to replace the prior practice of proceeding in rem in admiralty suits involving a foreign state by arresting or attaching its vessel or cargo. See 28 U.S.C. 1609; H.R. Rep. 94-1487, at 21-22; S. Rep. 94-1310, at 21-22; 1976 *Hearings* 74-75, 97-98; *Castillo v. Shipping Corp. of India*, 606 F. Supp. 497, 502-503 (S.D.N.Y. 1985); *China Nat'l Chem. Import & Export Corp. v. M/V Lago Hualaihue*, 504 F. Supp. 684, 689-690 & n.1 (D. Md. 1981). The legislative history states that a plaintiff may also bring an admiralty claim under Section 1605(a) (H.R. Rep. 94-1487, at 21-22; S. Rep. 94-1310, at 21-22). Although the FSIA does not contain a comparable provision specifically addressing patent, copyright and trademark suits, such suits may be considered under the commercial activity exceptions in 28 U.S.C. 1605(a), where applicable. See Morris, *Sovereign Immunity: The Exception for Intellectual or Industrial Property*, 19 Vand. J. Transnat'l L. 83, 94 (1986).

¹⁴ See also 1976 *Hearings* 24 (statement of Legal Adviser Leigh) (the FSIA assures that American citizens "are not deprived of normal legal redress against foreign states who engage in ordinary commercial transactions or who otherwise act as a private party would"); see also *id.* at 31, 36 (remarks of Bruno Ristau) ("private-law activities"); *id.* at 31 ("private-law dispute").

sistent with the general thrust of that distinction that Congress's principal purpose in fashioning the tort exception in 28 U.S.C. 1605(a)(5) was to lift a foreign sovereign's immunity with respect to injuries caused by traffic accidents and similar acts in the United States (H.R. Rep. 94-1487, at 9, 20-21; S. Rep. 94-1310, at 10, 20-21; 1976 *Hearings* 27, 58; 1973 *Hearing* 42). Such conduct is the sort in which private persons engage and for which they may be sued under domestic tort law.

By contrast, there is no suggestion whatever in the legislative history that the tort exception in 28 U.S.C. 1605(a)(5) was intended to subject a foreign state to the jurisdiction of United States courts for injuries allegedly sustained as a result of an armed attack by its military forces outside the United States in time of war.¹⁵ That is not conduct "which private persons normally perform" (H.R. Rep. 94-1487, at 14; S. Rep. 94-1310, at 14) or that is addressed by the domestic tort law of the United States governing private conduct; it is, rather, governed by customary international law and conventions that specifically address the actions of sovereign states in time of war. See notes 4, *supra*, and 27, *infra*. See also 28 U.S.C. 1606 ("the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances"); *Feres v. United States*, 340 U.S. 135, 141-142 (1950); *United States v. Johnson*, No. 85-2039 (May 18, 1987), slip op. 9-10.

Moreover, when the FSIA was passed, acts of a nation's armed forces were regarded as classic examples of what were termed sovereign or "public acts," for which one nation was entitled to immunity in the courts of another nation, as the Second Circuit itself previously recognized in *Victory Transport, Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354, 360 (1964), cert. denied, 381 U.S. 934 (1965). In fact, during the 1976 *Hearings*, a representative of the maritime bar observed that "acts concerning the Armed Forces" would not fall within the exceptions to the general rule of immunity under

¹⁵ This case of course does not present any occasion to consider the extent, if any, of a foreign state's immunity for intentional or negligent acts or omissions by its military forces committed in the United States, in either a combatant or noncombatant role.

the FSIA (1976 *Hearings* 95, citing *Victory Transport*).¹⁶ It therefore is especially implausible to suppose that Congress intended the tort exception in 28 U.S.C. 1605(a)(5) to abrogate a foreign state's immunity from the jurisdiction of United States courts in a suit seeking damages for a military attack on a ship on the high seas in time of war.¹⁷ The court of appeals' holding that respondents nevertheless may prosecute such suits under the Alien Tort Statute therefore is utterly incompatible with the balance Congress struck in the FSIA.¹⁸

2. Consistent with the text and legislative history of the FSIA, this Court made clear in *Verlinden* that the FSIA "contains a comprehensive set of legal standards governing claims of

¹⁶ See also 1976 *Hearings* 93 (until mid-century, United States courts applied the absolute rule of immunity "to shield foreign sovereigns from liability not only for public acts, such as the navigation of warships, but also for commercial activities, such as the operation of state-owned merchant vessels"); *id.* at 95-96 (emphasis added) (the FSIA "removes the defense for most tort suits arising here, which would include among other cases, automobile accidents involving diplomatic personnel and collisions involving State-owned merchant vessels or even foreign warships in U.S. territorial waters").

¹⁷ The sensitivity of military affairs in the context of foreign sovereign immunity is reflected in 28 U.S.C. 1611(b)(2), which preserves a foreign state's immunity from attachment or execution even of property in the United States, if the property is "of a military character" or "under the control of a military authority or defense agency," and if it "is, or is intended to be, used in connection with a military activity." This immunity is firmly rooted in international law (*The Schooner Exchange*, 11 U.S. (7 Cranch) at 144; *United States v. Thierichens*, 243 F. 419, 420-421 (E.D. Pa. 1917); Geneva Convention on the High Seas, Art. 8, 13 U.S.T. 2315; 1 L. Oppenheim, *International Law* § 450 (1955); Delupis, *Foreign Warships and Immunity for Espionage*, 78 Am. J. Int'l L. 53, 56-57, 74-75 (1984)), and it was included in the FSIA to "avoid the possibility that a foreign state might permit execution on military property of the United States abroad under a reciprocal application of the act" (H.R. Rep. 94-1487, at 31; S. Rep. 94-1310, at 31).

¹⁸ This conclusion is supported by a brief exchange during the hearings regarding the *Mayaguez* incident, which involved the seizure by Cambodian forces of an American merchant vessel (see U.S. Dep't of State, *Digest of United States Practice in International Law* 777-782 (1975)). Representative Jordan inquired whether that incident would have been affected by the FSIA if it had been in effect. Legal Adviser Leigh responded that "there's nothing in this bill which would have been applicable to that situation—nothing" (1976 *Hearings* 53-54).

immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities" (461 U.S. at 488), and that "if a court determines that none of the exceptions to sovereign immunity applies, the plaintiff will be barred from raising his claim in any court in the United States" (*id.* at 497). The Court explained (*id.* at 493-494 (emphasis added; footnote omitted)):

The [FSIA] must be applied by the district courts in every action against a foreign sovereign, since subject-matter jurisdiction in any such action depends on the existence of one of the specified exceptions to foreign sovereign immunity, 28 U.S.C. § 1330(a). At the threshold of every action in a district court against a foreign state, therefore, the court must satisfy itself that one of the exceptions applies—and in doing so it must apply the detailed federal law standards set forth in the Act.

This understanding of the statutory scheme pervades the opinion in *Verlinden*.¹⁹ See also *First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 622 n.11 (1983). The court of appeals' conclusion that respondents may sue petitioner under the Alien Tort Statute without regard to rules of immunity and limitations on subject matter jurisdiction in the FSIA therefore cannot be reconciled with *Verlinden*.

The other courts of appeals likewise have taken the position that the FSIA contains the exclusive standards for resolving claims of sovereign immunity by foreign states.²⁰ In fact, as the

¹⁹ See 461 U.S. at 489 ("if the claim does not fall within one of the exceptions, federal courts lack subject-matter jurisdiction"); *id.* at 493 (the FSIA "comprehensively regulat[es] the amenability of foreign nations to suit in the United States"); *id.* at 495 n.22 (quoting H.R. Rep. 94-1487, at 12 ("the Act's purpose is to set forth 'comprehensive rules governing sovereign immunity'")); *id.* at 496 (same); *ibid.* ("the jurisdictional provisions of the Act are simply one part of this comprehensive scheme"); *id.* at 496-497 ("The Act thus does not merely concern access to the federal courts. Rather, it governs the types of actions for which foreign sovereigns may be held liable in a court in the United States, federal or state.").

²⁰ See, e.g., *MacArthur Area Citizens Ass'n*, 809 F.2d at 919; *Jackson v. People's Republic of China*, 794 F.2d 1490, 1493 (11th Cir. 1986), cert. denied, No. 86-909 (Mar. 9, 1987); *City of Englewood v. Socialist People's Libyan Arab Jamahiriya*, 773 F.2d 31, 35 (3d Cir. 1985); *Yugoexport, Inc. v. Thai*

panel below acknowledged (Pet. App. 11a), the Second Circuit had adhered to that view prior to its decision in this case. See, e.g., *O'Connell Machinery Co. v. M.V. "Americana"*, 734 F.2d at 116. Similarly, other courts of appeals have held that the jurisdictional provisions in 28 U.S.C. 1330(a) are exclusive and cannot be circumvented by resort to other jurisdictional provisions, such as the federal-question and diversity statutes, 28 U.S.C. 1331 and 1332.²¹ In particular, the District of Columbia Circuit held in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (1984), cert. denied, 470 U.S. 1003 (1985), that the FSIA barred the district court from exercising jurisdiction over a tort suit against a foreign sovereign based on conduct that occurred outside the United States, even though the plaintiffs invoked the district court's jurisdiction under the Alien Tort Statute. See 726 F.2d at 776 n.1 (Edwards, J., concurring); *id.* at 805 n.13 (Bork, J., concurring). See also *In re Korean Air Lines Disaster of Sept. 1, 1983*, No. 83-0345 (D.D.C. Aug. 2, 1985), slip op. 10-11; *Siderman v. Republic of Argentina*, No. CV 82-1772-RMT (C.D. Cal. Mar. 7, 1985).

C. THE COURT OF APPEALS' RATIONALE FOR CIRCUMVENTING PETITIONER'S IMMUNITY FROM THE JURISDICTION OF UNITED STATES COURTS UNDER THE FSIA IS WITHOUT MERIT

The court of appeals acknowledged that the legislative history of the FSIA, this Court's decision in *Verlinden*, and its own prior decision in *O'Connell* all support the view that the FSIA is "the sole basis for United States jurisdiction over foreign sovereigns" (Pet. App. 11a). The court concluded, however,

Airways Int'l, Ltd., 749 F.2d 1373, 1375 (9th Cir. 1984), cert. denied, 471 U.S. 1101 (1985); *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 372 (7th Cir. 1985).

²¹ *Gour v. Compania Peruana de Vapores*, 688 F.2d 417, 420-422 (5th Cir. 1982); *REX v. CIA. Pervana de Vapores, S.A.*, 660 F.2d 61, 64-65 (3d Cir. 1981), cert. denied, 456 U.S. 926 (1982); *Williams v. Shipping Corp. of India*, 653 F.2d 875, 881 (4th Cir. 1981), cert. denied, 455 U.S. 982 (1982); *Ruggiero v. Compania Peruana de Vapores*, 639 F.2d 872, 875-876 (2d Cir. 1981); see also *Joseph v. Office of Consulate General of Nigeria*, 830 F.2d 1018, 1021 (9th Cir. 1987).

that because the FSIA provides exceptions to sovereign immunity primarily for commercial disputes, "Congress was not focusing on violations of international law when it enacted the FSIA" (*ibid.*) and that the FSIA therefore should not be construed to bar what the court viewed as "existing remedies" under the Alien Tort Statute based on alleged violations of international law (*ibid.*). Indeed, the court believed that to construe the FSIA to bar such suits would conflict with international law (*id.* at 10a). This reasoning is wrong in every respect.

1. It is irrelevant for present purposes whether an alien might have been permitted to bring an action against a foreign state under the Alien Tort Statute *prior* to 1976, based on the actions of its military forces outside the United States in time of war. For even if there once was a plausible basis for such a suit — which there was not (see pages 25-27, *infra*) — the text and legislative history of the FSIA make clear that ever *since* 1976, the FSIA has been the exclusive basis for exercising jurisdiction over (and for determining the immunity of) foreign states. See 28 U.S.C. 1602 (emphasis added) ("Claims of foreign states to immunity should *henceforth* be decided by courts of the United States and of the States in conformity with the principles of this chapter."). Compare *Block v. North Dakota*, 461 U.S. 273, 284-285 (1983); *United States v. Mottaz*, 476 U.S. 834, 846-847 (1986).

2. The court of appeals sought to avoid this jurisdictional preclusion by resorting to the premise that Congress, in enacting the FSIA, did not focus on acts by a foreign state that violate international law, and that the FSIA therefore should be construed to permit suits seeking redress for such acts under other jurisdictional regimes (Pet. App. 11a). Even if the court of appeals' view of Congress's focus were correct, the lack of specific discussion of one subpart of a subject in the legislative history is no basis for excluding that subpart from the coverage of a statute that is both written and described in its legislative history in all-embracing terms. *Jefferson County Pharmaceutical Ass'n v. Abbott Laboratories*, 460 U.S. 150, 159 n.18 (1983); *GTE Sylvania*, 447 U.S. at 110-111. But in fact, the court of appeals was wrong in believing that Congress did not have violations of international law in mind when it enacted the

FSIA. The FSIA contains an express exception to the rule of foreign sovereign immunity where the suit involves rights in property that were taken "in violation of international law" (28 U.S.C. 1605(a)(3)). This provision for certain suits based on violations of international law indicates that other such suits that are not expressly permitted are barred. *United States v. Erika, Inc.*, 456 U.S. 201, 208 (1982).

Moreover, the Alien Tort Statute, which respondents invoke, vests the district courts with jurisdiction over actions brought by an alien for a tort committed in violation of the "law of nations" or a treaty of the United States. As this Court observed in *Verlinden* (461 U.S. at 493 n.19), however, when Congress enacted the FSIA, it relied in part on its power under the Constitution to define offenses against the "Law of Nations" (Art. I, § 8, Cl. 10). See H.R. Rep. 94-1487, at 12; S. Rep. 94-1310, at 12. The comprehensive statutory scheme under the FSIA therefore applies in full force to all suits brought against a foreign state alleging a violation of the "law of nations" and necessarily forecloses the fashioning of different jurisdictional and immunity rules in a suit for a violation of the "law of nations" under 28 U.S.C. 1350.

3. The court of appeals also was wrong in believing that the FSIA must be construed to permit this suit under the Alien Tort Statute in order to avoid placing the United States out of step with prevailing principles of international law. The limitation of the tort exception in 28 U.S.C. 1605(a)(5) to suits based on acts or omissions occurring within the territorial jurisdiction of the United States was consistent with international law and practice when it was enacted (see note 9, *supra*), and it remains so today. See U.N. Gen. Assembly, *Report of the International Law Commission on the Work of its Thirty-Sixth Working Session* 155-158 (1984); U.N. Leg. Series, *Materials on Jurisdictional Immunities of States and Their Property* 8, 30, 37, 43, 159 (1982); *McKeel v. Islamic Republic of Iran*, 722 F.2d at 588. That limitation is designed to minimize unnecessary friction between nations by permitting a foreign state to be sued in the forum state only in those circumstances in which it would be liable under the *lex loci delicti commissi*, and thereby confining the application of the forum state's substantive rules of conduct

to matters occurring within its territorial jurisdiction.²² Thus, it is the decision of the court of appeals, not the statutory standards of immunity under the FSIA, that is out of step with principles of international law.²³

4. In any event, the court of appeals was seriously mistaken in its basic premise that the Alien Tort Statute furnished "existing remedies" against a foreign state in 1976 for conduct such as that at issue here, and that Congress therefore must have

²² The *Report* cited in the text discusses Article 14 of a draft convention on the immunity of states, which provides that a state may not invoke immunity from the jurisdiction of the forum State with respect to proceedings relating to compensation for death or injury to the person or damage to or loss of tangible property "if the act or omission * * * occurred wholly or partly in the territory of the State of the forum, and if the author of the act or omission was present in the territory at the time of the act or omission." *Report* at 155. The Commentary explains that "[t]he basis for the assumption and exercise of jurisdiction in cases covered by this exception is territoriality" (*Report* at 158), and it sets forth some of the practical considerations supporting the exception as so limited: (i) "[s]ince the act or omission has occurred in the territory of the State of the forum, the applicable law is clearly the *lex loci delicti commissi* and the most convenient court is that of the State where the delict was committed"; (ii) "[t]he injured individual would have been without recourse to justice had the State been entitled to invoke its jurisdictional immunity"; and (iii) "the physical injury to the person or the damage to tangible property * * * appears to be confined principally to insurable risks," and the rule of nonimmunity therefore "will preclude the possibility of the insurance company hiding behind the cloak of State immunity and evading its liability to the injured individuals" (*Report* at 156). Significantly, moreover, the commentary explains that as a result of the requirement that the author of the act or omission have been present in the forum State, "cases of shooting or firing across a boundary or of spill-over across the border of shelling as a result of armed conflict, which constitute clear violations of the territory of a neighboring State under public international law, are excluded from the areas covered by article 14" (*Report* at 157).

²³ The extent to which the court of appeals departed from established principles of sovereign immunity is further underscored by the fact that the United States would be immune from suit in its own courts based on conduct such as that alleged here, because the Federal Tort Claims Act bars a suit based on "[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war" (28 U.S.C. 2680(j)). It is implausible to suppose that Congress nevertheless intended to subject a foreign nation to suit in the courts of the United States based on identical conduct. See also 10 U.S.C. 2734(a) and (b)(3).

meant to preserve those remedies when it enacted the FSIA. The court of appeals pointed to no evidence that the Alien Tort Statute was intended to abrogate the sovereign immunity of a foreign state.²⁴ As the district court pointed out (Pet. App. 32a), that Statute makes no mention of a foreign state as a possible defendant. Moreover, the First Congress, which enacted the Alien Tort Statute in 1789, clearly would not have contemplated that a foreign state would be subject to suit under that Statute, because the prevailing view of international law at the time, as reflected in this Court's decision in *The Schooner Exchange*, was that a foreign state was absolutely immune from the jurisdiction of the courts of another state.

Indeed, until 1952, the United States continued to take the position that a foreign state was entitled to immunity from all suits in the courts of another state without its consent. *Verlinden*, 461 U.S. at 486-487. Even after 1952, when the United States adopted the view that a foreign state could be sued for acts of a commercial or private nature, the Executive Branch continued to take the position that a foreign state was, under all circumstances, entitled to immunity for its sovereign or public acts (*id.* at 487)—which, as noted above, unquestionably included the use of armed force on the high seas in time of war. See pages 19-20, *supra*. In light of this practice, it is not surprising that the court of appeals did not cite a single case decided prior to the enactment of the FSIA in which a court of the United States exercised jurisdiction under the Alien Tort Statute (or any other jurisdictional provision) over a suit against a foreign state based on the commission of a public or sovereign act that allegedly violated international law. Nor are we aware of any such case.²⁵ See Kirgis, *Alien Tort Claims*,

²⁴ Cf. *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 207 (D.C. Cir. 1985); *Canadian Transp. Co. v. United States*, 663 F.2d 1081, 1092 (D.C. Cir. 1980) (both holding that the Alien Tort Statute does not waive the sovereign immunity of the United States to a suit by an alien).

²⁵ Aside from the decision in this case, the only other case in which jurisdiction was exercised over a foreign state under the Alien Tort Statute was decided long after the FSIA was enacted. *Von Dardel v. Union of Soviet Socialist Republics*, 623 F. Supp. 246 (D.D.C. 1985). However, the district court's reliance on the Alien Tort Statute was an alternative holding made in the context of a default judgment, and the court did not address the question

Sovereign Immunity and International Law, 82 Am. J. Int'l L. 323, 325 n.7, 326 (1988); *I Congreso del Partido*, [1981] 2 All E. R. 1064, 1078. There accordingly is no basis for attributing to Congress a supposed intention to preserve such "existing remedies" under the Alien Tort Statute when it enacted the FSIA. Compare *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 378-382 (1982).²⁶

whether the exclusive jurisdictional and immunity provisions of the FSIA foreclosed the exercise of jurisdiction under the Alien Tort Statute.

²⁶ Quite aside from the unique bar of sovereign immunity where a foreign state is the defendant, there is some reason to doubt that the First Congress conceived of the Alien Tort Statute as authorizing the courts of the United States to recognize and entertain a cause of action by an alien against *any* defendant based on a violation of the law of nations that was committed outside the United States by persons who have no nexus to the United States or its nationals. Compare *Lauritzen v. Larsen*, 345 U.S. 571, 577-579, 592-593 (1953). Rather, Congress appears to have been primarily concerned with affording a forum for those seeking redress for violations of the law of nations for which the United States might, as a practical matter, be held accountable, and which therefore might involve the United States in an international controversy if redress was not afforded. Such violations would principally include those committed in the United States (e.g., the celebrated incident of an assault on the French Minister, discussed in *Respublica v. De Longchamps*, 1 U.S. (1 Dall.) 111 (Pa. Oyer & Term. 1784); compare 18 U.S.C. 112), and, perhaps, certain violations committed outside the United States but by persons subject to its jurisdiction. Under this construction, however, an assault by a British citizen on the French Minister in Great Britain (or an attack on the high seas by the military forces of one foreign nation upon a ship registered under the laws of another foreign nation), while perhaps a violation of the "law of nations" in a general sense, would not give rise to a cause of action cognizable in the courts of the United States under the Alien Tort Statute, because the incident would not normally be subject to the laws of the United States and would not give rise to any international responsibility on the part of the United States.

This interpretation of the Alien Tort Statute finds support in the origins of the constitutional provision that confers on Congress the power to "define and punish Offences against the Law of Nations" (Art. I, § 8, Cl. 10). This provision was adopted in response to the lack of power by the Continental Congress to punish offenses against the law of nations, and thereby to prevent incidents involving the States or their people from embroiling this Nation with foreign nations. See *Tel-Oren*, 726 F.2d at 783-784 (Edwards, J., concurring); *The Federalist* No. 3 (Jay), at 43-44 (Rossiter ed. 1961); *id.* No. 42 (Madison), at 265; cf. *id.* No. 80 (Hamilton), at 476; *Boos v. Barry*, No. 86-803 (Mar. 22,

5. The decision of the court of appeals could have a substantial adverse impact on the foreign relations of the United States. The United States does not condone violations of international law, and the United States takes the position that petitioner Argentine Republic should take responsibility for any such violations that it committed in its territory or on the high seas during the war with Great Britain. But sensitive foreign policy concerns are implicated by the court of appeals' holding that the courts of the United States may assume responsibility for determining whether such a violation occurred and for awarding damages against petitioner if they find a violation.²⁷

1988), slip op. 9. This interpretation also is supported by the text of 28 U.S.C. 1350 itself, which confers jurisdiction over suits based on a tort "committed in violation of . . . a treaty of the United States" (emphasis added). The quoted language suggests that a suit will lie only where there is an alleged violation of an international obligation undertaken by the United States. See Rogers, *The Alien Tort Statute and How Individuals "Violate" International Law*, 21 Vand. J. Transnat'l L. 47, 54-55 (1988).

Moreover, because the Alien Tort Statute (like the federal-question statute) is only jurisdictional in nature, it does not create a cause of action. In the absence of an Act of Congress that extends the substantive law of the United States to wrongs committed by one alien against another outside the United States and creates a private cause of action for a violation, a court would be required to "imply" a cause of action under whatever general principles of international law it believed should govern that conduct. Such an approach would present sensitive questions of foreign relations and the proper role of Article III courts (see *Tel-Oren*, 726 F.2d at 801-808 (Bork, J. concurring))—especially where, as here, the defendant is a foreign state. The Second Circuit took a far broader view of the Alien Tort Statute in *Filartiga*, upon which that court relied in this case (Pet. App. 8a-9a). However, whatever the soundness of *Filartiga* (see U.S. Amicus Br. 13-14 n.11 (pet. stage)), that case was decided in 1980; it therefore could have given Congress no reason to believe, when it passed the FSIA in 1976, that an alien could even sue an individual defendant (much less a foreign state) under that Statute based on conduct occurring outside the United States and having no nexus to this country or its nationals.

²⁷ The difficulties are illustrated by this case. Substantive principles regarding the use of military force against civilians in time of war are governed by such instruments as the Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907 (the Hague Convention IV) (36 Stat. 2277); the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949 (6 U.S.T. 1949); and the Proces-Verbal Relating to the Rules of Submarine Warfare Set Forth in Part IV of the Treaty of London of April 22,

The decision below not only has the extraordinary effect of requiring petitioner to answer to the courts of a neutral third party regarding its conduct during a time of war. It also threatens to turn the courts of the United States into tribunals in which aliens generally (but not United States citizens) may seek redress against foreign governments for conduct that has no substantial nexus to the United States. As this Court observed in *Verlinden*, "Congress was aware of the concern that 'our courts [might be] turned into small 'international courts of claims[,]'. . . open . . . to all comers to litigate any dispute which any private party may have with a foreign state anywhere in the world.'" 461 U.S. at 490, quoting 1976 *Hearings* 31. And as this Court further observed, "Congress protected against that danger . . . by enacting substantive provisions requiring some form of substantial contact with the United States. See 28 U.S.C. 1605" (461 U.S. at 490). The court of appeals failed to respect those substantive limitations here. In addition, because the decision below creates jurisdiction where none was intended by Congress when it enacted the FSIA, it may cause foreign states to take reciprocal measures by opening their courts to suits against the United States alleging violations of "international law" occurring anywhere in the world. Compare *Boos v. Barry*, slip op. 10-11.²⁸ These consequences will be avoided if

1930 (London Nov. 6, 1936) (*Documents on the Laws of War* 147-150, 153-155 (1982)). Although Article 3 of the Hague Convention provides that a belligerent party that violates regulations concerning the conduct of war "shall, if the case demands, be liable to pay compensation" (36 Stat. 2290), that provision and the Geneva Convention have been held not to be self-executing and therefore not to give rise to a private right of action against individual defendants. *Huynh Thi Anh v. Levi*, 586 F.2d 625, 629 (6th Cir. 1978); *Dreyfus v. Von Finck*, 534 F.2d 24, 29-30 (2d Cir.), cert. denied, 429 U.S. 835 (1976); *Tel-Oren*, 726 F.2d at 809 (Bork, J., concurring); *Handel v. Artukovic*, 601 F. Supp. 1421, 1425 (C.D. Cal. 1985). *A fortiori*, those instruments would not give rise to a private right of action against a state party, especially in a foreign forum. The court of appeals' recognition of an identical cause of action under the Alien Tort Statute allows an alien (but not a United States citizen) to circumvent this limitation.

²⁸ See *Foreign Sovereign Immunities Act: Hearing Before the Subcomm. on Admin. Law & Governmental Relations of the House Comm. on the Judiciary*, 100th Cong., 1st Sess. 17, 19, 30-31, 41, 51 (1987); note 17, *supra*.

the Court interprets the FSIA in the manner required by its text and legislative history.

CONCLUSION

The judgment of the court of appeals should be reversed and the case should be remanded to the court of appeals with instructions to affirm the judgment of the district court dismissing respondents' suits for lack of subject matter and personal jurisdiction.

Respectfully submitted.

CHARLES FRIED
Solicitor General

JOHN R. BOLTON
Assistant Attorney General

LOUIS R. COHEN
Deputy Solicitor General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

ABRAHAM D. SOFAER
Legal Adviser

EUGENE PINKELMANN
*Attorney
Department of State*

JUNE 1988

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No. 87-1372

IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

ARGENTINE REPUBLIC,
Petitioner,

v.

AMERADA HESS SHIPPING CORPORATION
and
UNITED CARRIERS, INC.,
Respondents.

**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND JUDICIAL CIRCUIT**

**MOTION FOR LEAVE TO FILE A BRIEF AS
AMICUS CURIAE
and
BRIEF FOR THE REPUBLIC OF LIBERIA AS
AMICUS CURIAE
IN SUPPORT OF RESPONDENTS**

FRANK L. WISWALL, JR.,
*Counsel for the
Republic of Liberia*
11870-D Sunrise Valley Drive
Reston, Virginia 22091-3303
(703) 620-6780

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IN THE
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ARGENTINE REPUBLIC,

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—v.—

AMERADA HESS SHIPPING CORPORATION
and

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**MOTION OF THE REPUBLIC OF LIBERIA
FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE***

The Republic of Liberia hereby respectfully moves the Court for leave to file the within brief as *amicus curiae* in the matter captioned above. Counsel for Respondents Amerada Hess Shipping Corporation and United Carriers, Inc. have consented to the filing of the brief; Counsel for Petitioner Argentine Republic has not consented.

This case arises directly under the Constitutional grant of admiralty and maritime jurisdiction, including jurisdiction in prize and neutrality cases. Liberia is the neutral State in the present case, which puts before the Court certain important issues which it has not considered in more than 150 years.

The **HERCULES** was an unarmed merchant ship of Liberia, engaged in the domestic trade exclusively between ports of the United States at the time she was attacked by Petitioner's forces. Respondents, the time charterer and the owner of the **HERCULES**, are Liberian corporate nationals doing business in the United States.

The interests of the Republic of Liberia in the instant case are limited but important. They are (i) to ensure that the Treaty of Friendship, Commerce and Navigation between the United States and Liberia is justified, recognized and applied; and (ii) to support the principle that an unprovoked armed attack by a sovereign state upon a neutral merchant ship on the high seas is under the Law of Nations an act which avoids the natural immunity of the attacking sovereign and which requires absolutely the cooperation of neutral courts to ensure that compensation is made.

The Republic of Liberia wants nothing more than justice for its nationals; but of equal importance is the demand of the Law of Nations that the innocent victims of armed attack on the high seas shall have an effective remedy for their injuries.

Liberia is concerned that, because of the emphasis placed below upon the sovereignty of Petitioner, it may be assumed that any foreign sovereign would assume the position of absolute immunity advocated by Petitioner and by the United States as *amicus*. It is important to Liberia that it be given the opportunity as another sovereign—one whose neutrality has been outrageously violated—to make its argument to the Court that there are good and sufficient grounds for the absence of immunity in the present case.

It is for these reasons that the Republic of Liberia requests this Honorable Court to grant its motion for leave to file the following brief.

Respectfully submitted,

FRANK L. WISWALL, JR.,
Counsel for the
Republic of Liberia
 11870-D Sunrise Valley Drive
 Reston, Virginia 22091-3303
 (703) 620-6780

Dated: August 25, 1988

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OCTOBER TERM, 1987

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**ON WRIT OF CERTIORARI TO THE
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**BRIEF FOR THE REPUBLIC OF
 LIBERIA AS *AMICUS CURIAE*
 IN SUPPORT OF RESPONDENTS**

Opinions Below

The opinion of the Second Circuit is reported at 830 F.2d 421, 1987 AMC 2705 (1987). The opinion of the District Court is reported at 638 F. Supp. 73 (S.D.N.Y. 1986). Both opinions are reproduced in the Appendix to the Petition for Certiorari (hereafter "P.A."), pp. 1a—35a.

The caption of the case in this Court contains the names of all the parties.

Constitutional Provisions Involved

U.S. CONST. Art. I, § 8, Cl. 10

The Congress shall have power . . .

To define and punish Piracies and Felonies committed on the high seas; and Offenses against the Law of Nations;

U.S. CONST. Art. III, § 2, Cl. 1

The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction;

Treaty Provisions Involved

TREATY OF FRIENDSHIP, COMMERCE
AND NAVIGATION
BETWEEN
THE UNITED STATES AND LIBERIA.
SIGNED AT MONROVIA, AUGUST 8, 1938
(54 STAT. 1739, T.S. NO. 956).

ARTICLE I

• • • • •

The nationals of each High Contracting Party shall enjoy freedom of access to the courts of justice of the other on conforming to the local laws, as well for the prosecution as for the defense of their rights, and in all degrees of jurisdiction established by law.

The nationals of each High Contracting Party shall receive within the territories of the other, upon submitting to conditions imposed upon its nationals, the most constant protection and security for their persons and property, and shall enjoy in this respect that degree of protection that is required by international law. Their property shall not be taken without due process of law and without payment of just compensation.

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ARTICLE XVII

Limited liability and other corporations and associations, whether or not for pecuniary profit, which have been or may hereafter be organized in accordance with and under the laws, National, State or Provincial, of either High Contracting Party and which maintain a central office within the territories thereof, shall have their juridical status recognized by the other High Contracting Party provided that they pursue no aims within its territories contrary to its laws. They shall enjoy free access to the courts of law and equity, on conforming to the laws regulating the matter, as well for the prosecution as for the defense of rights in all the degrees of jurisdiction established by law.

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GENEVA CONVENTION ON THE HIGH SEAS, 1958
(13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82)

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ARTICLE 23

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7. Where a ship has been stopped or arrested on the high seas in circumstances which do not justify the exercise of the right of hot pursuit, it shall be compensated for any loss or damage that may have been thereby sustained.

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Statutes

**JUDICIARY ACT OF 1789
28 U.S.C.**

§ 1333. Admiralty, maritime and prize cases

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

(2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize.

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§ 1350. Alien's action for tort

The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

* * * * *

**FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976
28 U.S.C.**

§ 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

* * * * *

(5) . . . in which money damages are sought against a foreign state for . . . damage to or loss of property, occurring in the United States and caused

by the tortious act or omission of that foreign state . . .

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state:

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* * * * *

Foreign Law Involved

**LIBERIAN CODE OF LAWS REVISED
TITLE 5: ASSOCIATIONS LAW**

PART I: BUSINESS CORPORATIONS
[The Liberian Business Corporation Act of 1976]

CHAPTER 2. CORPORATE PURPOSES AND POWERS

* * * * *

§ 2.5 Effect of incorporation; corporation as proper party to action.

A corporation is a legal entity, considered in law as a fictional person distinct from its shareholders or members, and with separate rights and liabilities. The corporation is a proper plaintiff in a suit to assert a legal right of the corporation and a proper defendant in a suit to assert a legal right against the corporation;

* * * * *

LIBERIAN CODE OF LAWS OF 1956
TITLE 22: MARITIME LAW
[The Liberian Maritime Law]

CHAPTER 1. CONSTRUCTION

SECTION 30

Adoption of American General Maritime Law.—Insofar as it does not conflict with any other provisions of this Title, the non-statutory General Maritime Law of the United States of America is hereby declared to be and is hereby adopted as the General Maritime Law of the Republic of Liberia.

* * * * *

Statement of the Case

The Liberian tank vessel **HERCULES** (Official Number of Registry 3763) of 216,641 DWT, owned by Respondent United Carriers, Inc. and time-chartered to Respondent Amerada Hess Shipping Corporation, had for several years prior to her loss been engaged exclusively in the United States domestic port-to-port trade, carrying crude oil in interstate commerce from the port of Valdez, Alaska, south around Cape Horn and north to a refinery at the port of St. Croix, U.S. Virgin Islands, bunkering there and returning in ballast along the same route to Valdez. Both Respondents are and were at all times Liberian corporate nationals in good standing.

On May 25, 1982, the **HERCULES** departed St. Croix in ballast and fully bunkered for the round trip to Valdez. At this time the Falklands/Malvinas War was in progress in the South Atlantic, a conflict in which Liberia was at all times a strictly neutral nation. Agencies of the U.S. Government and the **HERCULES** herself (by radio) kept Argentine government agencies informed of her identity, her voyage and her position.

On June 8, 1982, on the high seas and without warning, Argentine government air forces made three separate bom-

bing sorties against the **HERCULES** between 1350 and 1625 G.M.T., damaging her severely and leaving an undetonated bomb lodged tightly in the upper internal members of the No.2 port wing cargo tank. After survey and expert advice it was considered a practical impossibility to safely remove the bomb, and Respondent United Carriers was forced to scuttle the vessel more than a mile deep in open sea. As a result of this unprovoked attack upon an unarmed neutral merchant ship, Respondent owner United Carriers, Inc. lost a vessel worth \$10,000,000.00 and her charter, and Respondent charterer Amerada Hess Shipping Corporation lost bunkers worth \$1,901,257.07 together with the future use of the **HERCULES**.

After the attack upon the **HERCULES**, *amicus* sought clarification of the incident from Petitioner through diplomatic channels; no satisfactory response was ever received, and Petitioner has refused even to discuss the necessary compensation of Respondents.

Summary of Argument

I. The Treaty of Friendship, Commerce and Navigation ("FCN Treaty") between the United States and Liberia entitles the Respondents, both Liberian corporate nationals, a right of access to the Courts of the United States upon an equal footing with U.S. citizens. Because the present case involves a matter of neutrality, arising directly under the Constitution's grant of maritime jurisdiction in Article III, § 2, Cl. 1, the Courts of the United States become by virtue of the FCN Treaty the courts of a neutral state for adjudication of Respondents' rights under maritime international law.

II. Customary maritime international law, which is equally binding upon the United States, Argentina and Liberia, requires that the attacking state compensate the loss of a neutral ship unjustifiably attacked on the high seas. While the present case presents certain of these issues to the Court for the first time in over a century and a half, there is ample precedent in the late 18th and early 19th century decisions

of the Court. The attack which led to the destruction of the **HERCULES** was not only a violation of international law, but was a maritime tort, and application of the Alien Tort Statute, 28 U.S.C. § 1350, is consistent with the requirements of maritime international law that full compensation be paid to Respondents for their actual loss and damage.

III(a). The Alien Tort Statute, 28 U.S.C. § 1350, carries into law the power granted by the Constitution in Article I, § 8, Cl. 10 to "define... Offenses against the Law of Nations." The FCN Treaty requires that Respondents receive within the United States "that degree of protection that is required by international law" for their property capable of protection by the United States, which must include their property rights as neutrals where an offense against the law of nations has been committed. The Alien Tort Statute, in this respect, merely exercises the Constitutional authority of Congress in a case arising under the Constitutional grant of maritime jurisdiction to the Courts of the United States.

(b). The finding of the District Court that no loss whatsoever occurred in the United States was clearly erroneous, as the undisputed facts show that both Respondents suffered substantial losses within the United States which were a direct consequence of the attack by Petitioner upon the **HERCULES**. The District Court could, therefore, have utilized the tort exception of the Foreign Sovereign Immunities Act ("F.S.I.A."), but instead held that the F.S.I.A. completely bars Respondents from obtaining relief. Both Petitioner and the United States as its supporting *amicus* likewise contend that the F.S.I.A. is absolutely controlling with regard to any action whatsoever against a foreign sovereign in the Courts of the United States. That argument blinks at two fundamental obstacles: (1) that Congress clearly indicated in 28 U.S.C. § 1602 its intention that the F.S.I.A. apply in cases involving the "commercial activities" of foreign states, whereas this case involves the public governmental activity of a foreign state resulting in a deliberate and tortious violation of maritime international law; and (2) that because this case arises directly under the Constitutional grant of admiralty and maritime jurisdiction, the logical conclusion

of the argument advanced by Petitioner and the United States is that the F.S.I.A. may not merely regulate the application but may actually bar the exercise of jurisdiction granted to the courts by the Constitution. The Court has, in any case, long held that no Act of Congress should be so construed as to violate neutral rights, and the decision of the District Court did indeed ignore those rights—not least by failing to apply the F.S.I.A.'s tort exception in 28 U.S.C. § 1605(a)(5). That approach would also have minimized the applicability of the present case to other cases involving the loss of maritime property by torts committed outside the jurisdiction of the United States.

IV. It is proper for the Court to bear in mind, when deciding the disposition of this case, that a reinstatement of the decision of the District Court would leave Respondents without recourse to justice in any forum, and that result would be contrary to a fundamental characteristic of the admiralty jurisdiction. It would, however, be expected that the District Court consider the issue of *forum non conveniens* on remand.

ARGUMENT

I. The Treaty of Friendship, Commerce and Navigation Between the United States and Liberia Guarantees to the Respondents Standing Equal to That of Citizens of the United States.

The Treaty of Friendship, Commerce and Navigation of 1938 between the United States and Liberia, 54 Stat. 1739, T.S. No. 956, guarantees generally in Article I (*supra*, p. 4) a "freedom of access to the courts of justice" by Liberian nationals seeking redress in the United States.¹

¹ By Article XVII of the FCN Treaty (*supra* p. 5), this right is made more specific with regard to Liberian corporations doing business in the United States, to wit: "They shall enjoy free access to the courts of law and equity, on conforming to the laws regulating the matter, as well as for the prosecution as for the defense of rights in all the degrees of jurisdiction established by law."

The District Court recognized the juridical status of Respondents, accepting as fact that they are Liberian corporations (P.A. 26a). Of course, both Respondents have the capacity to sue and be sued. See § 2.5 of the Liberian Business Corporation Act, *supra*, p. 7.

The law of the United States with regard to standing to sue under such clauses as those in the present FCN Treaty was well declared in *The Nordic Regent*, 654 F.2d 147, 1980 AMC 309 (2d Cir. 1978), cert. den. 449 U.S. 890 (1980), where in writing for a majority of the entire Circuit bench and commenting upon *Farmanfarmaian v. Gulf Oil Corp.*, 588 F.2d 880 (2d Cir. 1978), Judge Timbers noted that, with regard to the standard FCN Treaty phrase "access to the courts", "Such access would have little value if the door that admits is a revolving one." 654 F.2d at 153, 1980 AMC at 318, n. 6.

Such right of access is, of course, independent of the grounds upon which relief is sought, and Respondents must bring a cognizable cause of action against a suable defendant; but the underlying principle for application to cases such as the present was settled long ago:

The courts of the captor are still open for redress. The injured neutral, it is to be presumed, will there receive indemnity for a wanton or illicit capture; and if justice be refused him, his own nation is bound to vindicate or indemnify him.

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The material questions necessary to be considered, in order to dissipate these doubts, are, 1st. Does this principle properly furnish a plea to the jurisdiction of the admiralty courts? 2d. If not, then does not jurisdiction over the subject-matter draw after it every incidental or resulting question relative to the disposal of the proceeds of the *res subjecta*?

The first of these questions was the only one settled in the case of *Glass v. The Betsey*. [3 U.S. (3 Dall.) 6 (1794)], and the case was sent back with a

view that the district court should exercise jurisdiction, subject, however, to the law of nations on this subject as the rule to govern its decision.

And this is certainly the correct course. Every violent dispossession of property on the ocean is, *prima facie*, a maritime tort; as such, it belongs to the admiralty jurisdiction.

L'Invincible, 14 U.S. (1 Wheat.) 238, 256-57 (1816).

The phrase above used by Justice Johnson—"... if justice be refused him, his own nation is bound to vindicate or indemnify him"—certainly refers to vindication or indemnity through recourse to the courts of the offended neutral state. But as the early cases show, the neutral admiralty court of the United States was always open to aliens for vindication and indemnity where their neutral rights had been violated, even when that violation was committed by a foreign sovereign's armed vessel. See *infra*, pp. 22-24. By virtue of the FCN Treaty an admiralty court of the United States becomes for these Liberian nationals the appropriate court of a neutral state. As put by Justice Story, "We see no difficulty in supporting the jurisdiction as concurrent in both [belligerent and neutral] nations. But, if there be any choice, it seems more properly to belong to the country of the injured than of the offending party." *The Marianna Flora*, 24 U.S. (11 Wheat.) 1, 57 (1826).

Liberia has adopted, by statutory reference, the entire body of the non-statutory general maritime law of the United States; see Section 30 of the Liberian Maritime Law, *supra*, p. 8. Thereby the decisions of this Court in all cases of prize and neutrality have become the law of Liberia. The interests of aliens as well as Liberians were considered in choosing to follow the American law, as explained in one respect by the Supreme Court of Liberia nearly a century ago:

In admiralty the court is bound to determine the cases submitted to its cognizance, upon equitable principles and according to the rules of natural justice. The grand object of doing justice between

the parties is superior to technical forms and rules, and where the strictest practice of the English common law or the civil law would turn a party out of court, or defeat or pervert justice, by considering an arbitrary rule of proceedings as paramount to all other considerations, the American admiralty finds in the educated reason and cultivated discretion of the court the means of defeating chicanery, rectifying mistakes, supplying deficiencies and suggesting to the party the means of reconstructing his case, if necessary, without the loss of such progress as he may have already made. (Ben. Adml. p. 218, sec. 358). *In admiralty, interests of great moment are involved to the nation, whether in respect to its own citizens, or to aliens. It upholds the nation's majesty and credit; largely, it effects its revenue, which is its lifeblood, that which enables it to exist and to maintain its independence, to develop its growth, and to afford it the means of support and protection to its citizens; therefore the law will not allow justice to be defeated through technicalities, or mere form, or slight nonessential omissions.*

Dennis v. Liberia, 1 Liberian L.R. 323, 327-28 (1898) (emphasis added).

Since under Liberian maritime law a Liberian national has the right to maintain suit against a wrongful attacker in the courts of Liberia for indemnity in a case of violent dispossession of property on the ocean, then under the FCN treaty an American national with the same claim may also maintain such a suit in the Courts of Liberia. And the reverse must also apply in the present case of maritime tort committed in violation of the law of nations. As Liberian corporate nationals doing business in the United States, Respondents need not resort to the courts of Liberia when the courts of the United States are competent to grant relief to an American citizen. Amerada Hess Shipping Corporation and United Carriers, Inc. stand before an admiralty court of the United States in the shoes of American citizens for purposes of asserting their claims.

The basic question therefore becomes that of jurisdiction over Petitioner, the Argentine Republic.

II. Application of the Alien Tort Statute to the instant case is consistent with maritime international law.

Wrongs done to a ship on the high seas lie within the ancient admiralty jurisdiction.² The entire crux of this case then is that the attack upon the **HERCULES** was committed by a foreign sovereign.

Both the customary international law of the sea (by which the United States, Argentina and Liberia are equally bound), and the expression of the rule in conventional international law (contained in Article 23 of the 1958 Geneva Convention on the High Seas, *supra*, p. 5, to which the United States is a Party), commit the nations of the world to ensure that when a neutral ship is unjustifiably attacked by a coastal State on the high seas, "it shall be compensated" by the attacking State for the loss thereby sustained.³

Amicus submits that the best guidance to be had in the present case is found in the late eighteenth and early nineteenth century decisions of the Court, during the long era of naval strife which began with the Revolution. It is to be admitted at the outset that no case on precisely all fours with the **HERCULES** has been found. There are, however,

² "That the Court has jurisdiction over the matters in question I cannot doubt. A suit in respect of injurious acts done upon the high seas was within the undisputed jurisdiction of the Court of Admiralty, as appears upon reference to Comyn's Digest (Comyn's Digest Tit. Admiralty, E. 7), and to Blackstone's Commentaries (Blackstone's Commentaries Book III., Cap. 7/S.3)..." *The Tubantia*, [1924] P. 78, 18 L.L.R. 158, 159 (P.D.A.D., 1924), per Sir Henry Duke (Lord Merrivale), P. And see BROWNE, *Compendious View of the Civil Law and the Law of the Admiralty*, vol. 2, p. 110 (2nd ed.) London, 1802; cited in *Jennings v. Carson*, 8 U.S. (4 Cranch) 2, 23 (1807).

³ Scholarly opinion is unanimous to the effect that Article 23 of the 1958 Convention on the High Seas and its counterpart provision in Article 111 of the 1982 United Nations Convention on the Law of the Sea are simply a codification of the long-established customary international law. See, e.g., O'CONNELL, *The International Law of the Sea*, vol. II, pp. 1078, 1084, Oxford, 1984.

a number of cases offering useful parallels; and if there is no *recent* authority to draw upon in respect of certain crucial points, that owes very simply to the fact that this is the first case in over a century and a half to present these issues to the Court.

In order to uphold the Law of Nations, and in particular the public order of the high seas, it has long been held essential for neutral maritime courts to assist in recovery of the compensation which international law particularly demands for such flagrant violations of the right of neutrals to freedom of navigation. As expressed by Justice Story in *The Amiable Nancy*:

The jurisdiction of the district court to entertain this suit [for marine trespass] *by virtue of its general admiralty and maritime jurisdiction*, and independent of the special provisions of the Prize Act . . . has been so repeatedly decided by this court, that it cannot be permitted again to be judicially brought into doubt. Upon the facts disclosed in the evidence, this must be pronounced a case of gross and wanton outrage, without any just provocation or excuse.

16 U.S. (3 Wheat.) 546, 558 (1818) (emphasis added).

Neutral courts are bound to do more than simply condemn such actions as those of Petitioner in mounting the prolonged attack on the **HERCULES** and then refusing to entertain any claim for the losses sustained; and the Judiciary Act of the United States offers a means for effective redress for such tort when "committed in violation of the law of nations" 28 U.S.C. § 1350.

There exists a category of tortious violations of the Law of Nations so grave that Congress *must not* be presumed, in the absence of specific reference, to have abolished jurisdiction over them in enacting the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602, *et seq.* See *infra*, pp. 21, 23-24. It is difficult to imagine a tort more fitting to be a subject of the Alien Tort Statute, 28 U.S.C. § 1350, than repeated

attack upon a clearly-identified neutral and unarmed merchant ship on the high seas, nor a case more certainly meeting the absolute requirement of international law for compensation. As again put by Justice Story:

Whatever may be the case, where a gross, fraudulent, and unprovoked attack is made by one vessel upon another upon the sea, which is attended with grievous loss or injury, such effects are not to be attributed to lighter faults or common negligence. It may be just, in such cases, to award to the injured party full compensation for his actual loss and damage; . . .

The Marianna Flora, 24 U.S. (11 Wheat.) 1, 40 (1826).

III. Petitioner enjoys no immunity from suit in this matter.

(a) The Alien Tort Statute

Respondents have invoked the Alien Tort Statute, 28 U.S.C. § 1350: "The district courts shall have original jurisdiction of **any civil action** by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." (Emphasis added.) The U.S.-Liberia FCN Treaty provides that: "The nationals of each High Contracting Party shall receive within the territories of the other, upon submitting to conditions imposed upon its nationals, the most constant protection and security for their persons and property, and shall enjoy in this respect **that degree of protection that is required by international law.**" (Article I, *supra*, p. 4; emphasis added.)⁴

The significance of these plain words to *amicus* is that "**any civil action**" grants jurisdiction notwithstanding the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602

⁴ This clause (and the FCN Treaty as a whole), is self-executing without reference to statute. "It stands on the same footing of supremacy as do the provisions of the Constitution and laws of the United States. It operates of itself, without the aid of any legislation, state or national; and it will be applied and given authoritative effect by the courts." *Asakura v. Seattle*, 265 U.S. 332, 340, 342 (1924). See also *Tucker v. Alexandroff*, 183 U.S. 424, 437 (1901).

et seq., where the tort committed is "in violation of the law of nations." As the United States maintains (Brief, pp. 13-14, 15), the word "any" is particularly significant and the plain meaning of the statute decides the issue. Indeed it is plain that the Alien Tort Statute was intended in 1789 to be the instrument of the Constitution, carrying into law the power granted to Congress "To define and punish Piracies and Felonies upon the high Seas, and Offenses against the Law of Nations." U.S. CONST. Art. I, § 8, Cl. 10. It cannot be coincidence that "violation of the law of nations" is one of the two grounds upon which the Alien Tort Statute, enacted in the year following adoption of the Constitution, may be invoked. As to contemporary interpretations, the sole commentary upon this Constitutional clause in *The Federalist* (by Madison, in No. 42) speaks only of the lack of provision in the Articles of Confederation for "the case of offenses against the law of nations," and the discussion which follows treats the power to "define" as quite separate and distinct from the power to "punish." The Alien Tort Statute is a clear exercise of the power of Congress to "define . . . Offences against the Law of Nations," for the purpose of allowing civil recovery for any tort so defined.

The Alien Tort Statute does not require that the tort be committed within the United States, nor does the FCN Treaty require that the property which is the subject of protection be located within the United States. What the FCN Treaty does require (Article I, p. 4 *supra*) is that **Respondents receive** within the United States "that degree of protection that is required by international law" for their property capable of protection by the United States, which must certainly include the rights of Respondents in and to their property. It is the gross violation of international law which resulted in the destruction of Respondents' neutral property that is at issue, and Respondents have brought their claims within the United States upon their rights to their destroyed property.

These alien Respondents seek the protection of their property rights in an unarmed neutral merchant ship in the Courts of the United States, alleging deprivation of that property by a maritime tort committed in violation of the

law of nations. The law of the United States, under the Constitutional grant of admiralty and maritime jurisdiction (*infra*, n.5) and as expressed in the Alien Tort Statute and the FCN Treaty, entitles Respondents to their day in the District Court of the United States.

(b) The Foreign Sovereign Immunities Act

The District Court took the F.S.I.A. as controlling in this matter, and granted Petitioner's motion to dismiss on grounds that Respondents had made out none of the exceptions to immunity in 28 U.S.C. §§ 1605-1607. The District Court found as a fact that "these Liberian plaintiffs . . . can claim no loss whatsoever occurring in the United States." 638 F. Supp. at 75. But in the same paragraph the District Court noted that "breathtakingly" broad interpretation has been given to language similar to that contained in § 1605(a)(5) in deciding the issue of jurisdiction. (P.A. 30a.)

There are reliable principles to be drawn from the prize and neutrality cases with respect to the present case. The prize jurisdiction is a part of the admiralty and maritime jurisdiction arising under U.S. CONST. Art. III, § 2, Cl. 1; and the Court held in *Jennings v. Carson*, 8 U.S. (4 Cranch) 2, 24 (1807), that the delegation of admiralty jurisdiction to the federal courts carries with it the prize jurisdiction without need for specific mention. See also *The Amiable Nancy*, *supra*, p. 16.⁵ Prize and capture is not a subject of criminal

⁵ The understanding that prize and neutrality are part and parcel of the admiralty jurisdiction well antedates the Constitution. As noted in *Benedict on Admiralty*, vol. 1 (Jurisdiction), §101, p. 7-3, n. 9 (E. Jhirad et al. 7th ed. rev., New York, 1985) in Rhode Island under the Confederation the "Maritime Court for the Trial of Prize Causes" was reconstituted in 1780 as a Court of Admiralty to exercise jurisdiction in respect of "causes concerning . . . all other matters and things of a Maritime Nature . . ." Justice Story in his *Commentaries on the Constitution*, speaking of the grant in Art. III, § 2, Cl. 1, says that "The word 'maritime' was, doubtless, added to guard against any narrow interpretation of the preceding word, 'admiralty'." Sec. 1666, at p. 466 (5th ed. 1891). In this comment Story was encapsulating the definitive exposition of the admiralty jurisdiction, given eighteen years earlier in his judgment in *DeLovio v. Boit*, 7 F. Cas. 418 (No. 3776) (C.C. Mass. 1815):

But whatever may in England be the binding authority of the

law but of maritime international law, yet it does not touch the "commercial activities" which are almost exclusively the subject of the F.S.I.A. as declared in 28 U.S.C. §1602. Petitioner and the United States as its supporting *amicus* argue that the *only* exceptions to immunity must be connected to commercial activities⁶ unless, under the tort exception in

common law decisions upon this subject, in the United States we are at liberty to re-examine the doctrines, and to construe the jurisdiction of the admiralty upon enlarged and liberal principles. The constitution has delegated to the judicial power of the United States cognizance "of all cases of admiralty and maritime jurisdiction;"

* * * * *

What is the true interpretation of the clause "all cases of admiralty and maritime jurisdiction?" If we examine the etymology, or received use, of the words "admiralty" and "maritime jurisdiction," we shall find, that they include jurisdiction of all things done upon and relating to the sea, or, in other words, all transactions and proceedings relative to commerce and navigation, and to damages or injuries upon the sea.

Id. at 441.

* * * * *

The clause however of the constitution not only confers admiralty jurisdiction, but the word "maritime" is superadded, seemingly *ex industria*, to remove every latent doubt. "Cases of maritime jurisdiction" must include all maritime contracts, torts and injuries, which are in the understanding of the common law, as well as of the admiralty, "*Causae civiles et maritimae*." In this view there is a peculiar propriety in the incorporation of the term "maritime" in the constitution. The disputes and discussions, respecting what the admiralty jurisdiction was, could not but be well known to the framers of that instrument. *Montgomery v. Henry*, 1 Dall. [1 U.S.] 149 [(1790)]; *Talbot v. Commanders and Owners of Three Brigs*, *Id.* 95. One party sought to limit it by locality; another by the subject matter. It was wise, therefore, to dissipate all question by giving cognizance of all "cases of maritime jurisdiction," or, what is precisely equivalent, of all maritime cases. Upon any other construction, the word "maritime" would be mere tautology; but in this sense it has a peculiar and appropriate force.

Id. at 442-43.

⁶ Even compensation for expropriation in violation of international law, cited by the United States for the proposition that Congress comprehended such violation within the F.S.I.A. (Brief, pp. 23-24), is tied firmly to the commercial activity requirement by 28 U.S.C. § 1605(a)(3).

§1605(a)(5), the actual physical act causing damage to or loss of property occurs within the United States.

Now the question must be posed: 'What mischief does this interpretation advocated by Petitioner and the United States work in the case of a neutral merchant vessel of the United States taken forcibly on the high seas by a foreign sovereign in violation of the law of nations, which then flies the flag of and is operated by that capturing sovereign as its own commercial state-owned vessel, and which later comes within the jurisdiction of the neutral courts of the United States where she and her captor are proceeded against by her rightful American owners?' Will the United States, in support of Petitioner, argue that the F.S.I.A. has divested American citizens of their historic neutral rights under the Constitutional grant of jurisdiction in maritime and prize law? Will it say that this was the intent of Congress? Or must it concede that there is, after all, no application of the F.S.I.A. to cases such as *The Estrella*, 17 U.S. (4 Wheat.) 298 (1819), which arise directly under the Constitutional jurisdiction and are clearly analogous in principle to the present case? There it was declared by Justice Livingston that

A neutral nation, which knows its duty, will not interfere between belligerents, so as to obstruct them in the exercise of their undoubted right to judge, through the medium of their own courts, of the validity of every capture made under their respective commissions, and to *decide on every question of prize law* which may 'arise' in the progress of such discussion. But it is no departure from this obligation, if, in a case in which a captured vessel be brought or voluntarily comes, *infra prae-sidia*, the neutral nation extends its examination so far as to ascertain whether a trespass has been committed on its own neutrality by the vessel which has made the capture. So long as a nation does not interfere in the war, but professes an exact impartiality toward both parties, it is its duty, as well as right, and its safety, good faith, and honor demand of it, to be vigilant in preventing its neutral-

ity from being abused, for the purposes of hostility against either of them. This may be done, not only by guarding, in the first instance, as far as it can, against all warlike preparations and equipments in its own waters, but, also, by restoring to the original owner such property as has been wrested from him . . .

17 U.S. (4 Wheat.) 298, 308-09 (emphasis added).

And it is proper in such cases for a neutral court to call into question the public non-commercial actions of the attacking foreign sovereign:

That the mere fact of seizure as prize does not, of itself, oust the neutral admiralty court of its jurisdiction, is evident from this fact, that there are acknowledged cases in which the courts of a neutral may interfere to divest possessions; to wit: those in which her own right to stand neutral is invaded; and there is no case in which the court of a neutral may not claim the right of determining whether the capturing vessel be, in fact, the commissioned cruiser of a belligerent power. Without the exercise of jurisdiction thus far, in all cases, the power of the admiralty would be inadequate to afford protection from piratical capture.

L'Invincible, 14 U.S. (1 Wheat.) 238, 258 (1816).

The precedents of the prize and neutrality cases, and those such as *The Amiable Nancy*, (*supra*, p. 16), which sound in prize but arise squarely under the Constitutional grant of maritime jurisdiction, are impossible to ignore in considering the present case.⁷ If the interpretation of Petitioner and the

⁷ The case of *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116 (1812), relied upon heavily by the United States (Brief, pp. 3, 20, 16), is simply inapposite to the present case. That case is also distinguished from all others cited herein by the first sentence of Chief Justice Marshall's opinion:

This case involves the very delicate and important inquiry, whether an American citizen can assert, in an American court, a title to an *armed national vessel*, found within the waters of the

United States is accepted, then the Constitutional grant of neutral jurisdiction to the courts of United States in prize cases, is overridden by the F.S.I.A.; but if the language "damage to or loss of property, occurring in the United States" is seen to include damage which is caused by an *act* which physically takes place outside the United States, then American citizens may, as heretofore, vindicate those neutral

United States.

Id. at 135 (emphasis added).

As Justice Story pointed out in the decision of the Court in *The Santissima Trinidad*, 20 U.S. (7 Wheat.) 283 (1822), the principle laid down in *The Schooner Exchange* involved an entirely different doctrine of maritime international law, *viz.*, the immunity of warships in neutral ports—a doctrine separate and apart from a sovereign's responsibility for violations of the law of nations:

In the case of *The Exchange*, 7 Cranch, 116, the grounds of the exemption of public ships were fully discussed and expounded. It was there shown that it was not founded upon any notion that a foreign sovereign had an absolute right, in virtue of his sovereignty, to an exemption of his property from the local jurisdiction of another sovereign, when it came within his territory; for that would be to give him sovereign power beyond the limits of his own empire. But it stands upon principles of public comity and convenience, and arises from the presumed consent or license of nations, that *foreign public ships coming into their ports, and demeaning themselves according to law, and in a friendly manner, shall be exempt from the local jurisdiction*. But as such consent and license is implied only from the general usage of nations, it may be withdrawn upon notice at any time, without just offense, and if afterwards such public ships come into our ports, they are amenable to our laws in the same manner as other vessels.

Id. at 352-53 (emphasis supplied).

In the present day, the old term "public ships" has become "ships owned or operated by a State and used only on government non-commercial service". See United Nations Convention on the Law of the Sea, 1982, Art. 96. But the public ship described by Chief Justice Marshall in *The Schooner Exchange* was also "an armed national vessel" and was categorized in that decision with "ships of war" (20 U.S. 135, 141, 146). The doctrine of immunity of warships in neutral ports is entirely separate and distinct from the maritime jurisdiction over sovereign commercial property in prize and neutrality cases. See *The Santissima Trinidad*, *supra*, and O'CONNELL, *supra* n. 3, vol. II at pp. 1106-08.

property rights which they have always enjoyed under Article III, § 2, Cl. 1—and which Congress never appears to have intended to exclude in debating, fashioning and enacting the F.S.I.A. Those rights enjoyed for 200 years by American citizens to proceed against a foreign sovereign for restoration or compensation for the loss of a captured neutral merchant vessel, not arising out of the commercial activity—but out of the *military activity*—of that attacking foreign sovereign, are the same rights as those of Respondents in this case.

A better illustration of the vindication of these Constitutional rights could hardly be desired than that of *The Santissima Trinidad*, 20 U.S. (7 Wheat.) 293 (1822). There a foreign neutral cargo seized by a warship on the high seas and later brought by that warship into the United States was libeled in the United States District Court by the neutral States. Despite the seizing sovereign's possession of the cargo, the Court decreed restitution. The Reporter of the Court, Dr. Henry Wheaton, himself an eminent international lawyer and author of the great and enduring *Elements of International Law*, summarized with particular care the arguments of counsel. On behalf of the neutral claimant one of the foremost advocates of the Bar in that day, Littleton W. Tazewell of Virginia, put the case as follows:

It is only important then to examine the question, whether the information of the sovereign or executive government be the proper and only standard to which the court must refer, in matters wherein not our own people, but foreign states are concerned. Whatever the theory may be on this subject, all know that, in point of fact, courts of justice do and must decide upon the right of sovereigns, and that even in governments the most absolute. For these courts must necessarily decide upon the rights of private individuals and corporations, and these are oft-times so interwoven with the rights of their sovereigns, that to decide upon the one, is to decide upon the other, not only in form, but effect also.

20 U.S. (7 Wheat.) at 302-03.

The Republic of Liberia's rights in the present case are interwoven with those of Respondents, as were the rights of the Empire of Spain with its nationals in *The Santissima Trinidad*.⁸

Amicus argues that the interpretation of 28 U.S.C. § 1605(a)(5) which should be adopted is that which does *not* oust the rights arising under a historic Constitutional jurisdiction in admiralty. This concern was specifically referred to in the section-by-section analysis of the proposed F.S.I.A. in 1973, which declared that it was not intended to supplant the specialized jurisdictional regimes of maritime and prize law. 1973 *Hearing* 47; 119 Cong. Rec. 2219 (1973). The United States argues (Brief, p. 17, n. 13) that this analysis should be disregarded because the exceptions in § 1605(b) were later added. The problem with accepting that argument is that § 1605(b) deals with only one part of admiralty jurisdiction, restricted again to "commercial activity of the foreign state," and does not mention the specialized admiralty and maritime jurisdiction as a neutral in non-commercial activity tort cases, let alone the jurisdiction in prize, capture and neutrality cases, all arising directly under the Constitution and as historically rooted in maritime international law.

Not only belligerents, but also neutrals have rights arising out of conflicts such as the Falklands/Malvinas War; and the Court in construing statutes of the United States has declared a special obligation to uphold such neutrals' rights and to promote neutral commerce, *viz.*:

... *an act of congress* ought never to be construed to violate the law of nations if any other possible construction remains, and, consequently, *can never be construed to violate neutral rights*, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country.

⁸ Indeed, if it were not for the FCN Treaty, Liberia's position would be that of a party rather than *amicus*. See *The Bello Corrunes*, 19 U.S. (6 Wheat.) 153, 168 (1821).

These principles are believed to be correct, and they ought to be kept in view in construing the act now under consideration.

Marshall, C.J., in *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (emphasis added).

The record before this Honorable Court shows by clear and uncontradicted evidence that both Respondents, as neutral nationals, did indeed suffer losses of property within the United States. The District Court accepted as fact that the **HERCULES** was engaged under time charter in a routine trade between two ports of the United States. 638 F. Supp. at 73. The **HERCULES** was carrying out this domestic U.S. port-to-port trade under Articles VII and XVI of the FCN Treaty.

Respondent United Carriers, Inc., owner of the **HERCULES**, suffered the loss of its vessel while she was employed in the U.S. domestic trade, and *amicus* submits that this is properly regarded as the loss of a property right occurring in the United States. Even more directly, the owner suffered loss of the U.S. charter hire, payable in U.S. dollars in the United States. This appears from Plaintiffs' Exhibit 1(A), the charterparty, (J.A.-41), which the District Court was bound to accept as proven fact for purposes of ruling upon the Motion to Dismiss, but which was simply ignored by that Court.

As to Respondent Amerada Hess Shipping Corporation, their loss was not only the value of the bunkers aboard the vessel, which were sold and delivered within the United States, but also the frustration of the charterparty, which caused them to lose their right to the use of the vessel in the exclusive U.S. domestic trade.

Amicus does not see how it is possible to characterize these losses otherwise than as occurring—at least in substantial part—within the United States, and submits that the decision of the District Court was clearly erroneous in finding that “no loss whatsoever” occurred in the United States. *McAllister v. United States*, 348 U.S. 19 (1954). Both the loss

to her owner of future earnings from the **HERCULES** and the loss to her charterer of future use of the vessel, while not quantified as separate elements of the damages, are losses from the same operative cause and are sufficient to vest jurisdiction under the F.S.I.A., 28 U.S.C. § 1605(a)(5).

Amicus, as a foreign sovereign, agrees that the Court should properly be concerned that the District Courts of the United States not sit unrestrained as ‘little international courts of claims.’ But a *limited* exercise of that function is precisely what is contemplated by the F.S.I.A.; and the peculiarly restrictive facts of the present case, involving the loss of a foreign vessel engaged exclusively in the domestic commerce of the United States, with charterparty made and charter hire payable in the United States, are not likely to provide fertile ground for future litigation.

IV. Respondents have no alternative forum.

The District Court, in granting Petitioner's Motion to Dismiss, had no occasion to address the issue of *forum non conveniens*. But the record makes painfully clear the total absence of any forum in Argentina or of any mutual agreement upon any other forum. Liberia's diplomatic efforts have been rebuffed by Petitioner. There are no known assets of Petitioner in Liberia, rendering meaningless any suit in this matter in the Liberian Courts even before the question of jurisdiction arises.

It is the position of *amicus* that when an attacking sovereign declines to open its courts, declines arbitration, and declines to entertain any suggestion of remedy for the neutral victims of its attack, then the victims are entitled to pursue their remedy in an effective forum. It is further the position of *amicus* that the District Courts of the United States offer the *only* forum capable of granting an effective remedy to the victims of the ultimately fatal armed attack upon the **HERCULES**, and that the United States District Court for the Southern District of New York, over a period of two centuries, has established an eminent ability in the application of maritime international law.

While it would be for the District Court on remand to consider the issue of *forum non conveniens* under the delegation of jurisdiction in 28 U.S.C. § 1333, together with the Alien Tort Statute and/or the F.S.I.A., this Honorable Court is already aware on the record before it that reinstatement of the District Court's decision would leave Respondents without recourse to justice in *any* forum. That, *amicus* submits, is an element of fundamental importance which it is proper for the Court to bear in mind on the disposition of this writ.

This is a case of admiralty and maritime jurisdiction, arising directly under Article III, § 2, Cl. 1 of the Constitution. It has been the hallmark of the admiralty jurisdiction as developed in the decisions of the Courts of the United States that it is applied in cases of uncertainty so as to avoid leaving the injured party with no forum. The principle has never been better stated than by Justice Paterson:

The property was not restored to the libellants, nor were they compensated in damages; of course the decree in their favor remains unsatisfied. They had no remedy at common law; they had none in equity; the only forum competent to give redress is the district court of New Hampshire, because it has admiralty jurisdiction. There they applied, and, in my opinion, with great propriety.

Judges may die, and courts be at an end; but justice still lives, and, though she may sleep for a while, will eventually awake and must be satisfied.

Penhallow v. Doane's Administrators, 3 U.S. (3 Dall.) 54, 93 (1795).

Conclusion

The Order of the Second Circuit should be affirmed; alternatively, the matter should be remanded to the District Court for trial on the merits with instructions to apply the maritime law of nations to the case.

Respectfully submitted,

FRANK L. WISWALL, JR.,
Counsel for The Republic of
Liberia as *amicus curiae*
11870-D Sunrise Valley Drive
Reston, Virginia 22091-3303
(703) 620-6780

Dated August 25, 1988

MOTION FILED
AUG 29 1987

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No. 87-1372

In the
Supreme Court of the United States

OCTOBER TERM, 1987

ARGENTINE REPUBLIC,

Petitioner,

v.

AMERADA HESS SHIPPING CORPORATION
and UNITED CARRIERS, INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION AND BRIEF OF THE
AMERICAN INSTITUTE OF MARINE UNDERWRITERS
AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENTS

MARILYN L. LYTLE
Counsel of Record
DOUGLAS A. JACOBSEN
BIGHAM ENGLAR JONES & HOUSTON
14 Wall Street
New York, New York 10005
(212) 732-4646

Attorneys for the American
Institute of Marine Underwriters
Amicus Curiae

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COURT OF APPEALS FOR THE SECOND CIRCUIT

**Statement of Interest of the American Institute of
Marine Underwriters and Motion for Leave to Inter-
vene as *Amicus Curiae* in Support of the Respondents.**

The American Institute of Marine Underwriters (AIMU) hereby requests permission to file a brief *amicus curiae* in the above matter. Consent of all parties has been duly requested. Respondents have consented to the filing of this brief. Counsel for the petitioner has referred the matter to the Argentine Foreign Ministry but no response has been received.

AIMU is a national trade association of over 110 insurance companies, each of which is authorized to engage in the business of marine insurance in one or more states of the United States. Issues of extreme importance to AIMU and its member companies are presented in this case. AIMU's membership underwrites approximately 90% of the marine insurance written in the United States. The insurance covers vessels and cargoes engaged in worldwide

commerce and losses that may occur anywhere in the world.

In filing this brief *amicus curiae*, AIMU is acting in support of the American marine insurance community as well as all maritime interests engaged in U.S. domestic or foreign trade. The United States has a vital interest in the protection of neutral shipping on the high seas. Today, only a small percentage of the ocean-borne foreign trade of the United States is carried on U.S.-flag ships. U.S. commerce relies heavily on foreign-flag vessels such as the *HERCULES*.

A neutral shipowner engaged in U.S. domestic trade must not be denied the right to adjudicate his claim in American courts. Any narrowing of the admiralty jurisdiction of U.S. courts would have a deleterious effect upon the marine war-risk and other marine insurance markets. Costs and availability would be adversely affected.

AIMU respectfully prays that this honorable Court accept its brief *amicus curiae*.

Respectfully submitted,

MARILYN L. LYTLE
Counsel of Record
 DOUGLAS A. JACOBSEN
 BIGHAM ENGLAR JONES & HOUSTON
 14 Wall Street
 New York, New York 10005
 (212) 732-4646

*Attorneys for the American
 Institute of Marine Underwriters
 Amicus Curiae*

August 1988

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AMERADA HESS SHIPPING CORPORATION
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 COURT OF APPEALS FOR THE SECOND CIRCUIT

**BRIEF OF THE AMERICAN INSTITUTE OF
 MARINE UNDERWRITERS AS AMICUS CURIAE
 IN SUPPORT OF THE RESPONDENTS**

Summary of Argument

Argentina's illegal actions in bombing the *HERCULES* on the high seas without provocation or warning, failing to provide a forum to adjudicate the rights of the owner and charterer of the vessel, and refusing to make restitution for the losses resulting from its actions violate the "Law of Nations" so as to confer jurisdiction under the Alien Tort Statute, 28 U.S.C. §1350. Argentina's actions, which also violate several international agreements to which Argentina and the United States subscribe, preclude immunity under the Foreign Sovereign Immunities Act, 28 U.S.C. §1602, *et seq.* The United States of America has a strong interest in providing a forum to adjudicate the rights of a neutral shipowner engaged in U.S. domestic trade. Maritime interests in the U.S. would be adversely affected by any narrowing of U.S. admiralty jurisdiction.

ARGUMENT

I.

The illegal bombing by Argentina of a neutral vessel on the high seas violates the "Law of Nations" so as to confer jurisdiction under the Alien Tort Statute, 28 U.S.C. §1350.

The Alien Tort Statute gives the district courts original jurisdiction for suits by aliens for torts committed in violation of the "Law of Nations" or a treaty of the United States, 28 U.S.C. §1350. The plain language of the statute provides that if an alien sues solely for a tort committed in violation of the "Law of Nations," the district courts have jurisdiction to hear the case. "Once a tort can be considered to be in violation of the law of nations, §1350 allows immediate access to a Federal Court." *Valanga v. Metropolitan Life Insurance Company*, 259 F.Supp. 324, 328 (E.D. Pa. 1966).

Whether considered by eighteenth-century or modern-day standards, the unprovoked attack without warning upon an innocent, neutral merchant vessel on the high seas without compensation violates the "Law of Nations." The Alien Tort Statute was enacted as part of the Judiciary Act of 1789, Ch. 20, 1 Stat. 73, 77. The term "Law of Nations" was employed elsewhere in eighteenth-century legislation as well as in the U.S. Constitution. *See*, 28 U.S.C. §1251(a)(2) (original jurisdiction over actions against ambassadors "not inconsistent with the law of nations"); 18 U.S.C. §1651 (punishment for those who commit "the crime of piracy on the high seas as defined by the law of nations. . . ."); and Art. I, §8, Cl. 10 of the U.S. Constitution (Congress has the power "[t]o define and punish Piracies and Felonies committed on the high seas, and offenses against the Law of Nations"). These enactments are reflective of the generally accepted view in 1789 that the "Law of Nations" included three primary offenses: "1.

Violation of safe-conducts; 2. Infringement of the rights of ambassadors; and 3. Piracy.'" *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 813 (D.C. Cir. 1984) quoting 4 W. Blackstone, *Commentaries*, 68, 72. Violation of safe conduct is the forerunner of the modern-day notion of neutrality. Violations of safe conduct occurring at sea were decided by the admiralty courts. 4 W. Blackstone, *Commentaries*, 69.

Leading eighteenth-century legal experts, including Wilson and Blackstone, confirm that the "Law of Nations" encompassed admiralty or the law maritime. *See*, *The Federal Courts' Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations*, 18 Conn. Law Review 467, 505. The notes of Oliver Ellsworth in drafting the Alien Tort Statute show that the courts were to have jurisdiction over seizures of vessels on the high seas in violation of the "Law of Nations." (J.A. 112).¹ The early decisions recognizing and enforcing the "Law of Nations" under Section 1350 primarily relate to maritime matters. *See*, *Lopes v. Reederei Richard Schroder*, 225 F. Supp. 292, 296 (E.D. Pa. 1963). Indeed, virtually every early case involving the Alien Tort Statute related to a violation of safe conduct or the law of capture concerning neutrals at sea. *See, e.g.*, *Jansen v. The Vrow Christina Magdalena*, 13 F. Cas. 356, 358 (D.C.S.C. 1794) (No. 7,216), *aff'd sub. nom.*, *Talbot v. Jansen*, 3 U.S. (3 Dall.) 133 (1795); *Bolchos v. Darrell*, 3 F. Cas. 810 (D.C.S.C. 1795) (No. 1,607); *Martins v. Ballard*, 16 F. Cas. 923, 924 (D.C.S.C. 1794) (No. 9,175); *Moxon v. The Fanny*, 17 F. Cas. 942, 947-948 (D. Pa. 1793) (No. 9,895). There is no doubt that the "Law of Nations" pertains to violations of the law of war. *In re Yamashita*, 327 U.S. 1, 7 (1946).

The court below found that the uncompensated attack upon an innocent merchant vessel on the high seas was tantamount to piracy. *Amerada Hess Shipping Corp. v. Argentine Republic*, 830 F.2d 421, 424 (2d Cir. 1987). (Pet.

¹ Respondents' Joint Appendix.

App. 1a-21a).² That decision is consistent with eighteenth-century legal practice and case law which held violations of the rights of neutral vessels on the high seas contrary to the "Law of Nations."

Courts have held that, in the context of Section 1350, a violation of the "Law of Nations" means a violation of those standards, rules or customs which affect the relationship between states or between an individual and a foreign state and which are used by those states for their common good and/or in dealings *inter se*. *Lopes, supra*, at page 297. *See also, IIT v. Vencap Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975).

International law clearly recognizes the right of innocent passage, both through the territorial sea and on the high seas. *See, Khedivial Line, S.A.E. v. Seafarers' International Union*, 278 F.2d 49, 52 (2d Cir. 1960). This principle of law is of the utmost importance to all maritime nations. International instruments and agreements protecting the rights of neutrals at sea date as far back as the Declaration of Paris in 1856 (A. 253).³ The Hague Convention of 1907 specifically requires belligerents to respect the rights of neutrals in neutral waters and to abstain from any act which would constitute a violation of neutrality. The bombing of an unarmed, neutral merchant ship on the high seas without provocation or warning is also a violation of the London Naval Conference of 1909 (A. 269) and of the Pan American Convention Relating to Maritime Neutrality of 1928 (A. 292). Argentina is a signatory to both the Hague and Pan American Conventions. The bombing of the *HERCULES* occurred in waters protected from hostile acts by the Declaration of Panama of 1939 (A. 313). International law protects the rights of neutral vessels on the high seas. An attack on an unarmed merchant ship on the high seas by a belligerent violates

² Petitioner's Appendix.

³ Respondents' Appendix in the Second Circuit.

the standards of conduct to which nations universally adhere.

The Law of the Sea Convention (A. 327) and the Geneva Convention on the High Seas of 1958 (A. 317) both require that neutral vessels be compensated for any loss or damage sustained for violations of these standards. Argentina has signed both Conventions. Not only has Argentina violated the "Law of Nations" by attacking a neutral vessel, it has refused to provide a forum to adjudicate the rights of respondents and refused to make restitution for the loss of the ship and other property. This disregard for international standards of conduct is virtually unprecedented in modern times.

Clearly, this controversy meets the generally settled test for application of the Alien Tort Statute. Plaintiffs are aliens and intentional destruction of a ship sounds in tort. The dispute implicates several treaties and a body of customary international law. *See, Trans-Continental Investment Corporation, S.A. v. Bank of the Commonwealth*, 500 F. Supp. 565, 570 (C.D. Ca. 1980). The wrongs complained of, the bombing of an innocent merchant vessel and the denial of a forum for review, are of mutual concern to the nations of the world expressed in several international conventions. The conduct of Argentina so offends universally accepted principles of civilized conduct that it violates the "Law of Nations." Argentina's illegal bombing of the *HERCULES* is a violation of international law within the meaning of the Alien Tort Statute.

The greater the degree of codification or consensus concerning an area of international law, the more appropriate it is for our courts to render decisions regarding it. *See, Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964). International law is a part of the law of our land. *The Paquete Habana*, 175 U.S. 677, 700 (1900). The right of innocent passage on the high seas is so well codified internationally and is so universally accepted by civilized

nations that U.S. courts can render decisions regarding the rights of neutral vessels. The Alien Tort Statute opens the federal courts for adjudication of the rights of alien shipowners when such rights are clearly recognized by international law. See, *Filartiga v. Pena-Irala*, 630 F.2d 876, 887 (2d Cir. 1980). The Alien Tort Statute means what it says. "[T]he starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). The district courts have original jurisdiction over suits by aliens for torts committed in violation of the "Law of Nations."

II.

Argentina should be denied immunity under the Foreign Sovereign Immunities Act, 28 U.S.C. §1602, et seq. and the Alien Tort Statute, 28 U.S.C. §1350, for the illegal bombing of a neutral vessel on the high seas and for refusal to make restitution.

The primary purpose in enacting the Foreign Sovereign Immunities Act, 28 U.S.C. 1602, et seq., Pub. L. 94-583, 90 Stat. 2892, 1976, "was to depoliticize sovereign immunity decisions by transferring them from the Executive to the Judicial Branch of government, thereby assuring litigants that such decisions would be made on legal rather than political grounds." *National Airmotive v. Iran*, 499 F. Supp. 401 (D.C. D.C. 1980). Political expediency should not play a role in the decision. In the past, the U.S. Department of State has taken the position that the Alien Tort Statute would provide jurisdiction over a foreign sovereign for an attack on a neutral vessel.

"Indeed, it has long been established that in certain situations, individuals may sue to enforce

their rights under international law. For example when a ship is seized on the high seas in violation of international law, the owner of the ship may sue to recover the ship as well as seek damages." Memorandum for the United States as *Amicus Curiae*, in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) reprinted in 19 I.L.M. 582, 602 (1980). (Emphasis added.)

Now the Department argues, improperly, in favor of immunity for political reasons.

Argentina is not entitled to immunity and should be held accountable for its attack on a neutral merchant vessel in contravention of international law. There are several grounds for the denial of immunity under the Foreign Sovereign Immunities Act. Each one alone would be sufficient to bar immunity for Argentina in this matter. Together they constitute an overwhelming case for the exercise of jurisdiction by U.S. courts over the Republic of Argentina in this matter.

A. The Foreign Sovereign Immunities Act was enacted subject to existing international agreements of the United States.

The Foreign Sovereign Immunities Act provides for the immunity of a foreign state "subject to existing international agreements to which the United States is a party at the time of enactment of this Act." 28 U.S.C. §1604. In 1976, when the Foreign Sovereign Immunities Act was enacted, the United States was party to the Geneva Convention on the High Seas and the Pan American Convention Relating to Maritime Neutrality of 1928. Both treaties protect the right of innocent passage of neutral merchant vessels on the high seas and provide for the payment of restitution in the event of any interference with that right. The Republic of Argentina also has signed both these treaties. Argentina's actions in bombing

a neutral merchant ship on the high seas violate the right of innocent passage. Interference with this internationally recognized right and Argentina's subsequent refusal to make reparations violate international agreements to which the United States is a party. Because these agreements predate the enactment of the Foreign Sovereign Immunities Act, immunity may not be granted to Argentina.

B. Argentina has waived any right to sovereign immunity by violating international treaties to which it subscribes.

Section 1605(a)(1) of the Foreign Sovereign Immunities Act provides that a foreign state will not be immune in any case in which that state has waived its immunity, either explicitly or implicitly. Argentina is a signatory to the Geneva Convention and the Pan American Convention which protect the right of innocent passage. Shortly after the attack on the *HERCULES*, Argentina also signed the Law of the Sea Convention of 1982, which also sets out the rights of neutral merchant vessels and mandates compensation for violation. By explicitly agreeing to be bound by the terms of these international agreements regarding the fundamental principle of the right of innocent passage of a neutral vessel on the high seas, Argentina has waived any right it might have had to claim sovereign immunity. Through its illegal actions in bombing the *HERCULES* and refusing to make restitution thereafter, Argentina has forfeited any claim it may have had to the shield of immunity. *Von Dardel v. Union of Soviet Socialist Republics*, 623 F. Supp. 246 (D.C. D.C. 1985); 28 U.S.C. §1605(a)(1).

C. The Foreign Sovereign Immunities Act must be interpreted in a manner consistent with international law.

The destruction of a neutral vessel on the high seas without provocation violates well-codified principles of international law. Argentina's action violates the standards of international conduct and thereby the United States common law (*supra*, p. 7-8). "[F]oreign sovereign

immunity is a matter of grace and comity on the part of the United States. . . ." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983). There is no justification for granting foreign sovereign immunity to a country which has violated its own international agreements and departed from standard international conduct in refusing to make restitution. "Neutral trade is entitled to protection in all Courts." *The Bermuda*, 70 U.S. 514, 551 (1865). Argentina is not entitled to immunity.

"Since the sinking of a neutral vessel on the high seas without justification violates a substantive principle of international law, no matter who does the sinking, there is no immunity under international law in this case." *Amerada Hess Shipping Corp. v. Argentine Republic. Supra*, at p. 5.

There is no other forum in which Liberian plaintiffs in this matter can obtain justice. The only place that the owner and charterer of this neutral vessel can seek redress is in U.S. courts. An "act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains, and consequently, can never be construed to violate neutral rights. . . ." *The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, C.J.). It would be inconsistent with international law to interpret the Foreign Sovereign Immunities Act in a matter which does not uphold the rights of neutral shipping.

D. Congress did not intend to repeal the Alien Tort Statute when it enacted the Foreign Sovereign Immunities Act.

At the time of enactment of the Alien Tort Statute, a sovereign could not violate the "Law of Nations" on the high seas with impunity. As a general rule, there was no blanket immunity for foreign states. *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812). The

Alien Tort Statute was conceived as a vehicle to protect the rights of neutral vessels against aggression by belligerents. (See discussion, *supra*, p. 4-5). Foreign sovereigns were only entitled to immunity if they acted within international law. Foreign ships of war may receive immunity, as a matter of comity, only if they demean themselves according to the law. *The Santissima Trinidad*, 20 U.S. (7 Wheat.) 283, 352 (1822). A foreign sovereign in violation of the "Law of Nations" is subject to the jurisdiction of U.S. courts. *Id.* at 349, 352-354.

The legislative history of the Foreign Sovereign Immunities Act is silent on the subject of the Alien Tort Statute. As repeal by implication is frowned upon, *Rodriguez v. U.S.*, 480 U.S. 522 (1987), *amicus* submits that Congress did not intend to foreclose access to the federal courts for an alien whose rights to neutrality have been violated on the high seas. See, Affidavit of Dr. Ved P. Nanda (J.A. 97, 99). Any other determination would narrow the admiralty jurisdiction of the United States courts and preclude alien plaintiffs whose neutral rights had been violated in contravention of international law from seeking redress in the United States courts as originally intended by the Alien Tort Statute.

E. Under the "tort exception" to the Foreign Sovereign Immunities Act §1605(a)(5), Argentina should be subject to the jurisdiction of U.S. courts.

Section 1605(a)(5) of the Foreign Sovereign Immunities Act provides an additional exception to the application of the Foreign Sovereign Immunities Act. Under the "tort exception," 28 U.S.C. §1605(a)(5), a foreign state may not be accorded immunity for damage to or loss of property occurring in the United States and caused by the tortious act or omission of that foreign state. Section 28 U.S.C. 1603(c) defines the term "United States" for purposes of the Foreign Sovereign Immunities Act to include "all

territory and waters, continental and insular, subject to the jurisdiction of the United States."

The admiralty jurisdiction of U.S. courts extends to the high seas. "Every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance." *The Plymouth*, 70 U.S. (3 Wall.) 20, 36 (1865).⁴

"Briefly, the admiralty jurisdiction of the United States extends to all waters, salt or fresh, with or without tides, natural or artificial, which are in fact navigable in interstate or foreign water commerce . . ." G. Gilmore and C. Black, *The Law of Admiralty*, 31-32 (2d Ed. 1975).

"Obviously the high seas are included . . ." *id.* at p. 31.

The attack on the *HERCULES* took place on the high seas. The high seas are waters subject to the jurisdiction of the United States as provided in 28 U.S.C. 1603(c). Accordingly, the bombing took place within waters over which the United States has jurisdiction for purposes of §1605(a)(5).

The attack caused direct injury to the American economy. (See, *infra*, p. 15). Argentina should not be accorded immunity. The bombing of the *HERCULES* constituted a tortious attack within the United States for purposes of the Foreign Sovereign Immunities Act. Therefore, Argentina may not be accorded immunity and the complaint of Liberian plaintiffs in this matter should be heard.

⁴ In *Executive Jet Aviation, Inc. v. Cleveland*, 409 U.S. 249 (1972), this definition was modified to require that the wrong bear a significant relationship to traditional maritime activity.

III.

The United States has a strong interest in the outcome of this dispute which warrants a hearing in U.S. courts.

The United States has a vital interest in the protection of neutral shipping on the high seas. Today, only a small percentage of the ocean-borne foreign trade of the United States is carried on U.S.-flag ships. The dependence of the United States on such foreign commerce has increased substantially since World War II. Yet the number of U.S.-flag ships continues to dwindle. U.S. companies have developed foreign-flag fleets under "flags of convenience" from nations such as Liberia and Panama. The dependence of U.S. foreign commerce on such foreign-flag ships is an economic reality of the twentieth century. The U.S. Maritime Administration has taken the position that foreign-flag vessels owned by American interests may be requisitioned in time of war. They are also eligible to participate in the government war-risk insurance program which would go into effect in time of war. 46 C.F.R. §308.1b (1987).

The importance of such foreign-flag vessels to the American economy is exemplified by the employment of the *HERCULES* (A. 220-223). From the opening of the Trans-Alaska pipeline in 1977 until the destruction of the *HERCULES*, the vessel was employed by Amerada Hess in the United States domestic trade. The *HERCULES* carried Alaskan crude oil to the Amerada Hess refinery in the U.S. Virgin Islands. The *HERCULES* was a foreign-flag vessel trading in domestic, interstate U.S. commerce. Eighty-three percent (83%) of the refined products manufactured from the crude oil carried by the *HERCULES* was consumed within the continental United States. It has been established that the balance was marketed in the Virgin Islands or purchased directly by the United States government.

See, *American Maritime Association v. Blumenthal*, 590 F.2d 1156, 1158-1160 (D.C. Cir. 1978).

As a result of Argentina's unprovoked attack on the *HERCULES*, the owners suffered the loss of a vessel employed in U.S. domestic trade and the loss of U.S. charterhire payable in U.S. dollars in the United States. The charterers lost the use of the vessel in U.S. domestic trade and the bunkers (fuel) on board the vessel which were sold and delivered within the United States before the voyage. The bombing of the *HERCULES* resulted in direct economic losses in the U.S. economy.

The United States has a vital interest in protecting the rights of neutral vessels on the high seas throughout the world. Most recently, U.S. naval power has actively protected the rights of merchant shipping in the Persian Gulf to keep vital ship lanes open. Since May of 1981 at least 524 vessels had been destroyed or damaged in the Persian Gulf. (*Business Insurance*, May 23, 1988, at 4, col. 1.) Industry analysts have indicated that few of such incidents would result in lawsuits in the United States, P. Loree, *Hercules and the Gulf, Fairplay*, February 11, 1988, at 12, col. 1. The threat to neutral and American shipping remains strong and has a direct effect upon American economic conditions. American courts must continue to provide a forum for the adjudication of rights of American shipowners and of neutral shipowners engaged in U.S. domestic trade if the ocean-borne commerce of the United States is to remain free. This is especially true in this rare case when no other forum is available. See generally, Brief of the Republic of Liberia as *Amicus Curiae* in Support of Respondents, at 27-28.

Another important economic factor to be considered is the cost and availability of marine insurance. The market for insuring blue water or ocean-going hulls such as the *HERCULES* is an international one. A large portion of the war-risk insurance on vessels such as the *HERCULES* may be placed in the American ocean marine insurance market.

Obviously, losses of the magnitude of the HERCULES affect rates paid by other shipowners.

Traditionally, ocean marine insurers offset substantial losses through "recovery programs" in which the rights of the shipowner (who has been paid for his losses) are subrogated to the underwriter. The insurer then proceeds against the wrongdoer who caused the loss in an attempt to recoup costs paid. Such recovery programs reduce insurance costs. See, Winter, *Marine Insurance*, pp. 423-424, 3rd Ed., 1952; Gilmore & Black, *supra*, p. 91-92. If marine insurers anticipate that there will be no forum in which to vindicate the rights of neutral shipowners, the cost and availability of marine war-risk insurance could be seriously affected.

The maritime community, composed of shipowners, charterers, marine underwriters and others, is a complex international industry. Maritime nations are economically interdependent upon one another. It is vital that U.S. courts be available for the protection of maritime commerce in which the U.S. has an interest, including the rights of neutral vessels on the high seas. Traditional admiralty jurisdiction over these matters must not be restricted in any way.

The admiralty jurisdiction of the U.S. courts should not be narrowed as a result of a decision in this matter. The Alien Tort Statute was enacted in the eighteenth century to provide a remedy for aliens whose rights were infringed upon in violation of the "Law of Nations." As originally conceived, the statute was part of admiralty jurisdiction. (See, *supra*, p. 5) Fortunately, in modern times it has not been necessary to utilize the Alien Tort Statute to provide a forum for neutral shipowners to litigate a violation of their rights, because most nations recognize and abide by international agreements. It is imperative that the U.S. district courts remain as a forum wherein the rights of neutral merchant vessels attacked without provocation on the high seas may be adjudicated. This is especially true in the context of this unusual case. Deprived of a potential

remedy, American maritime interests would be unprotected and the original intent of the Judiciary Act of 1789 would be vitiated.

CONCLUSION

It is respectfully submitted that the decision of the lower court is correct and that respondents' claims should be heard.

Respectfully submitted,

MARILYN L. LYTLE
Counsel of Record
DOUGLAS A. JACOBSEN
BIGHAM ENGLAR JONES & HOUSTON
14 Wall Street
New York, New York 10005
(212) 732-4646

*Attorneys for the American
Institute of Marine Underwriters
Amicus Curiae*

August 1988

MOTION FILED
AUG 30 1987

(11)
No. 87-1372

IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

ARGENTINE REPUBLIC,

Petitioner,

—v.—

AMERADA HESS SHIPPING CORPORATION and
UNITED CARRIERS, INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

**MOTION BY THE MARITIME LAW ASSOCIATION
OF THE UNITED STATES TO FILE
AMICUS CURIAE BRIEF AND
BRIEF IN SUPPORT OF RESPONDENTS**

R. GLENN BAUER
Counsel of Record
RICHARD W. PALMER
LIZABETH L. BURRELL
195 Broadway
New York, New York 10007
(212) 341-7000
*Attorneys for the Maritime
Law Association of the
United States, Applicant
for Leave to File Brief
as Amicus Curiae*

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**MOTION BY THE MARITIME LAW ASSOCIATION
OF THE UNITED STATES TO FILE
AMICUS CURIAE BRIEF AND
BRIEF IN SUPPORT OF RESPONDENTS**

Applicant, The Maritime Law Association of the United States ("MLA"), moves the Court for permission to file an *amicus curiae* brief in support of Respondents, Amerada Hess Shipping Corporation and United Carriers, Inc. Respondents have given consent, but consent has not been received from Petitioner. Leave to file must be sought pursuant to Rule 36.3.

NATURE OF APPLICANT'S INTEREST

Applicant has a very strong interest in the disposition of this case. MLA is a nationwide bar association founded in 1899. It has a membership of about 3500 attorneys, federal judges, law

professors and others interested in maritime law. It is affiliated with the American Bar Association and is represented in that Association's House of Delegates.

MLA's attorney members, most of whom are specialists in admiralty law, represent all maritime interests—shipowners, charterers, cargo owners, shippers, forwarders, port authorities, seamen, longshoremen, passengers, marine insurance underwriters and other maritime claimants and defendants.

MLA's purposes are stated in its Articles of Association:

The objectives of the Association shall be to advance reforms in the Maritime Law of the United States, to facilitate justice in its administration, to promote uniformity in its enactment and interpretation, to furnish a forum for the discussion and consideration of problems affecting the Maritime Law and its administration, to participate as a constituent member of the Comité Maritime International and as an affiliated organization of the American Bar Association, and to act with other associations in efforts to bring about a greater harmony in the shipping laws, regulations and practices in different nations.

In furtherance of these objectives MLA, during the eighty-eight years of its existence, has sponsored a wide range of legislation dealing with maritime matters including the Carriage of Goods by Sea Act ("COGSA")¹ and the Federal Arbitration Act.² The MLA has also cooperated with congressional committees in the formulation of other maritime legislation.³

¹ 46 U.S.C. §§ 1300-1315

² 9 U.S.C. §§ 1-14.

³ *E.g.*, Water Quality Improvement Act of 1970, 33 U.S.C. §§ 1161-1175; 1972 Water Pollution Control Act Amendments, 33 U.S.C. §§ 1251-1376; implementation of the 1972 Convention for Preventing Collisions at Sea, 28 U.S.T. 3459, T.I.A.S. 8587, U.N.T.S. 15824, as amended, T.I.A.S. 10672, *reprinted in* 6 Benedict on Admiralty, Doc. No. 3-4 at 3-34.1 -78.2 (7th ed. 1988) (hereinafter "Benedict"), *see* 33

MLA is also participating in several projects of a maritime legal nature undertaken by agencies of the United Nations, including its Commissions on Trade Law ("UNCITRAL") and Trade and Development ("UNCTAD"). It works closely with the International Maritime Organization ("IMO").

MLA has actively participated, as one of some forty-five national maritime law associations constituting the Comité Maritime International,⁴ in the movement to achieve maximum international uniformity in maritime law through the medium of international conventions.⁵

MLA believes uniformity in maritime law, both national and international, is of great importance. This concern has been repeatedly expressed by our membership and standing committees. For example, in 1975 the MLA Standing Committee on Uniformity of Maritime Law recommended that steps be taken to persuade congressional committees "that nationwide and, in fact, world-wide uniformity in the Maritime Law is highly desirable, not only from the standpoint of those involved with

C.F.R. ch. 1, subch. D, Special Note, at 160 (1987); Federal Court Jurisdiction Bill, S. 1876, 93d Cong., 1st Sess. (1973); United States Inland Navigation Rules, 33 U.S.C. §§ 2001-2073.

⁴ These now include the national associations of Argentina, Australia and New Zealand, Belgium, Brazil, Bulgaria, Canada, Chile, China, Colombia, Costa Rica, Czechoslovakia, Denmark, Egypt, Finland, France, Federal Republic of Germany (West Germany), Greece, Iceland, India, Indonesia, Ireland, Israel, Italy, Japan, Korea, Mexico, Morocco, The Netherlands, Nigeria, Norway, Panama, Philippines, Poland, Portugal, Spain, Sweden, Switzerland, Turkey, United Kingdom, United States, Uruguay, Union of Soviet Socialist Republics, Venezuela and Yugoslavia.

⁵ *E.g.*, Assistance and Salvage (1910), 37 Stat. 1658 (1913); Ocean Bills of Lading (1924), 51 Stat. 233 (1937); Collision (1910), *reprinted in* 6 Benedict, Doc. No. 3-2 at 3-11 -19; Limitation of Liability of Owners of Sea-Going Ships (1957), *reprinted in* 6 Benedict, Doc. No. 5-2 at 5-11 -29; Maritime Liens and Mortgages (1967), *reprinted in* 6A Benedict, Doc. No. 8-3 at 8-25 -32; Civil Liability for Oil Pollution Damages (1969), U.N.T.S. 1409, *reprinted in* 6 Benedict, Doc. No. 6-3 at 6-22.103 -76.1; and Limitation of Liability for Maritime Claims, *reprinted in* 6 Benedict, Doc. 5-4 at 5-32.1 -44.2.

maritime commerce but from that of the public as well." A resolution to that effect was unanimously adopted at the MLA Annual Spring Meeting on April 25, 1975.⁶ A substantially identical resolution was adopted by the American Bar Association in 1976. This policy has been reaffirmed by the MLA on several occasions, most recently in a 1986 resolution.⁷

MLA has, in furtherance of the uniformity policy and resolutions, filed *amicus* briefs in a number of cases, including four accepted by the United States Supreme Court.⁸

It is also the policy of MLA to file briefs as *amicus curiae* only when important issues of maritime law are involved and the Court's decision may substantially affect the uniformity of maritime law.

Such a situation exists in this case. A decision in favor of Petitioner would diminish the scope of federal courts' admiralty jurisdiction bestowed by the Constitution. Accordingly, we urge that this motion be granted.

MLA CAN MAKE A UNIQUE CONTRIBUTION ON RELEVANT ISSUES.

While all organizations and individuals involved in the law must necessarily be interested in any case in which an injured party may be deprived of a remedy, this is not the sole interest of MLA herein. MLA's interest arises from the participation of all its members in cases involving the maritime and admiralty jurisdiction.

As will be shown in MLA's brief, a decision in Petitioner's favor would deprive the federal courts of part of their constitutionally-granted admiralty jurisdiction and thus work

⁶ MLA Minutes, MLA Doc. No. 588 at 6397-98 (1975).

⁷ MLA Minutes, MLA Doc. No. 669 at 8769 (1986).

⁸ *Chick Kam Choo v. Exxon Corp.*, ____ U.S. ____, 108 S. Ct. 1684 100 L.Ed.2d 127 (1988); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978); *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973). For a complete listing, see MLA Report, MLA Doc. No. 671 at 8862-63 (1987).

serious harm to the maritime law. As a body which has as its primary objective the preservation and proper development of admiralty and maritime law, MLA has a strong interest and can make a unique contribution in this case.

DATED: August 30, 1988.

Respectfully submitted,

/s/ R. GLENN BAUER
R. Glenn Bauer
Counsel of Record

RICHARD W. PALMER
LIZABETH L. BURRELL
One Battery Park Plaza
New York, New York 10004
(212) 422-7585
*Attorneys for the Maritime
Law Association of the
United States, Applicant
for Leave to File
Brief as Amicus Curiae*

IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1372

ARGENTINE REPUBLIC,

Petitioner,

—v.—

AMERADA HESS SHIPPING CORPORATION and
UNITED CARRIERS, INC.,

Respondents.

ON WRIT OF CERTIORARI TO UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

**BRIEF OF THE MARITIME LAW ASSOCIATION OF
THE UNITED STATES, AS *AMICUS CURIAE*,
IN SUPPORT OF RESPONDENTS**

The Maritime Law Association of the United States ("MLA") respectfully submits this brief as *amicus curiae* in support of the Respondents, Amerada Hess Shipping Corporation and United Carriers, Inc.

QUESTION OF LAW PRESENTED

Does a denial of jurisdiction in a case involving a claim of tort on the high seas impermissibly diminish the constitutional grant of admiralty jurisdiction?

INTEREST OF AMICUS CURIAE

This is stated in the Motion which precedes this Brief.

SUMMARY OF ARGUMENT

The Constitution provides that the judicial power of the United States extends "to all Cases of admiralty and maritime Jurisdiction" Included within this jurisdiction at the time the Constitution was drafted and first interpreted were all cases of maritime tort committed on the high seas, and prize cases involving captures by sovereign-commissioned vessels on the high seas. To preserve the constitutionality of the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1331(a)(2)-(4), 1391(f), 1441(d), 1602-1611, courts must interpret that Act so as not to abridge the constitutional grant of admiralty and maritime jurisdiction. If the Act cannot be interpreted so as to preserve the constitutional grant of judicial power, to that extent the Act is unconstitutional.

ARGUMENT

I. THE ADMIRALTY AND MARITIME JURISDICTION BESTOWED BY THE CONSTITUTION EXTENDS TO ALL MARITIME TORTS ON THE HIGH SEAS, INCLUDING THOSE COMMITTED BY SOVEREIGNS.

Section 2 of Article III of the Constitution of the United States provides: "The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction" At the time the Constitution was drafted, as shown in the early cases dealing with the extent of maritime jurisdiction, the maritime powers of United States courts included jurisdiction over torts on the high seas, including cases affecting the rights of sovereigns in times of war. As this Court stated in *The Propeller Genesee Chief*, 53 U.S. (12 How.) 443 (1851):

Courts of admiralty have been found necessary in all commercial countries, not only for the safety and convenience

of commerce, and the speedy decision of controversies, where delay would often be ruin, but also to administer the laws of nations in a season of war, and to determine the validity of captures and questions of prize or no prize in a judicial proceeding.

Id. at 453. No act of Congress is required in order for the federal courts to take jurisdiction of cases involving torts on the high seas:

[I]n the absence of every act of congress in relation to this matter, the court would feel no difficulty in pronouncing the conduct here complained of, an abuse of the neutrality of the United States; and although, in such case, the offender could not be punished, the former owner would, nevertheless, be entitled to restitution.

The Estrella, 16 U.S. (4 Wheat.) 298, 311 (1819).

That the authority to adjudicate such disputes is bestowed by the constitutional grant of admiralty jurisdiction was made clear in *L'Invincible*, 14 U.S. (1 Wheat.) 238 (1816):

Every violent dispossession of property on the ocean is, *prima facie*, a maritime tort; as such, it belongs to the admiralty jurisdiction. . . .

[T]he mere fact of seizure as prize does not, of itself, oust the neutral admiralty court of its jurisdiction. . . .

Id. at 257-58.¹ Two years later, in *The Amiable Nancy*, 16 U.S. (3 Wheat.) 546 (1818), the Court held:

The jurisdiction of the district court to entertain this suit, by virtue of its general admiralty and maritime jurisdiction, and independent of the special provisions of the prize act . . . has been so repeatedly decided by this court, that

¹ The *L'Invincible* Court considered that the question of the courts' jurisdiction to award a recovery to an injured neutral had been resolved as early as 1794 in *Glass v. The Betsey*, 3 U.S. (3 Dall.) 6 (1794). See 14 U.S. (3 Wheat.) at 256-57.

it cannot be permitted again to be judicially brought into doubt.

Id. at 557-58 (footnote omitted).

The early cases demonstrate no judicial reluctance to adjudicate matters that clearly affected the rights of sovereigns by awarding damages against sovereign-commissioned captors of prizes taken in violation of international law, or restoring the captured vessels, or their value, to their owners. For example, in *The Amiable Nancy*, the Court awarded compensation to the owners of a neutral ship, which had been boarded, plundered and captured by a U.S. privateer:

Upon the facts disclosed in evidence, this must be pronounced a case of gross and wanton outrage, without any just provocation or excuse. Under such circumstances, the honor of the country, and the duty of the court, equally require that a just compensation should be made to the unoffending neutrals, for all the injuries and losses actually sustained by them.

Id. at 558.

Where a public ship of a foreign state had acted illegally by augmenting her crew in a U.S. port, this Court had no hesitation in holding that cargo unlawfully and piratically taken out of a foreign vessel on the high seas must be returned to her rightful owners:

[T]he doctrine of this court has long established, that such illegal augmentation is a violation of the law of nations, as well as of our own municipal laws, and as a violation of our neutrality, by analogy to other cases, it infects the captures subsequently made with the character of torts, and justifies and requires a restitution to the parties who have been injured by such misconduct.

The Santissima Trinidad, 20 U.S. (7 Wheat.) 283, 348-49 (1822).

In *Maley v. Shattuck*, 7 U.S. (3 Cranch) 450 (1806), the Court sustained an award of compensation to the owner of a

neutral merchant vessel captured by an armed U.S. public vessel for the value of the merchant vessel and her cargo because there was insufficient cause for the capture. This case is especially noteworthy in that the vessel and cargo had been lost to the owner before the commencement of the action and thus the ship was not within the territory of the United States at any time during the proceedings.

The foregoing decisions, and others in this line of cases, do not ignore the principles of sovereign immunity in ruling on the propriety of seizures; indeed, they recognize that if, after reviewing the evidence, the court is satisfied that the capture was made by a duly commissioned cruiser in the *legitimate* exercise of its commission—the seizure of a belligerent's property—the court must cease its inquiry. See, e.g., *L'Invincible*, 14 U.S. (1 Wheat.) at 252-58.² To state, however, that a sovereign cannot be held accountable in another nation's courts for the *legitimate* exercise of its wartime powers does not preclude inquiry into whether those powers were legitimately exercised or whether the captor has abused the rights of neutrals in violation of the law of nations. As noted by the *L'Invincible* Court: "Without the exercise of jurisdiction thus far, in all cases, the power of admiralty would be inadequate to afford protection from piratical capture." *Id.* at 258. Jurisdiction is not affected by the fact that the capture was made by a public armed vessel as opposed to a privateer. *Id.* at 253.³ Accordingly, admiralty courts have consistently conducted an examination of the captor's commission, the circumstances of the capture and the

2 *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116 (1812), is often cited as authority for judicial recognition of the sovereign immunity given to warships of a friendly foreign nation, and the case so holds. This immunity, however, is given as a matter of comity during a peaceful visit in port and should not be extended to excuse a gross, unfair and unprovoked attack against a neutral merchant vessel on the high seas.

3 "As to restitution of prizes made in violation of neutrality, there could be no reason suggested for creating a distinction between the national armed vessel and the private armed vessels of a belligerent." *L'Invincible*, 14 U.S. (1 Wheat.) at 253.

nationality of the captured vessel as either a neutral or belligerent.

In the exercise of their admiralty and maritime jurisdiction, the federal courts have also guarded against violations of U.S. neutrality by captors. Even when the capture is of a belligerent vessel, the courts of a neutral nation into whose territory the prize is brought or voluntarily comes may inquire into the validity of the seizure and have a duty "to be vigilant in preventing its neutrality from being abused" *The Estrella*, 17 U.S. (4 Wheat.) at 309. This principle was also applied in *The Appam*, 243 U.S. 124 (1917), in which the Court restored a British merchant vessel captured by a German warship to her owners because the captor violated U.S. neutrality by using a U.S. port as a parking lot for its prize.⁴

The judicial power of United States courts clearly includes jurisdiction to inquire into the circumstances surrounding torts committed on the high seas, even when the alleged tort is performed by a sovereign. As the respondents herein claim to have suffered a violent dispossession of their property on the high seas, their claim falls within the traditional ambit of admiralty jurisdiction bestowed by the Constitution.

II. NEITHER THE FOREIGN SOVEREIGN IMMUNITIES ACT NOR ANY OTHER STATUTE CAN BE PERMITTED TO ABRIDGE THE CONSTITUTIONAL GRANT OF ADMIRALTY JURISDICTION TO THE FEDERAL COURTS.

As this Court stated in *Panama R.R. Co. v. Johnson*, 264 U.S. 375 (1924):

After the Constitution went into effect, the substantive law theretofore in force was not regarded as superseded or as being only the law of the several States, but as having become the law of the United States—subject to power in Congress to alter, qualify or supplement it as experience or

⁴ In the instant case, the unprovoked bombing of an unarmed merchant vessel plying the U.S. domestic trade might well be viewed as a violation of U.S. neutrality.

changing conditions might require. When all is considered, therefore, there is no room to doubt that the power of Congress extends to the entire subject and permits of the exercise of a wide discretion. But there are limitations that have come to be well recognized. One is that *there are boundaries to the maritime law and admiralty jurisdiction which inhere in those subjects and cannot be altered by legislation, as by excluding a thing falling clearly within them or including a thing falling clearly without.*

Id. at 386 (emphasis added).

The cases cited in the foregoing section demonstrate that the admiralty jurisdiction extends to all torts committed on the high seas, regardless of the identity of the tortfeasor. Accordingly, Congress did not have power to exclude cases of maritime tort from the admiralty jurisdiction in enacting the Foreign Sovereign Immunities Act. Either the Act must be read so as not to conflict with the constitutional grant of jurisdiction or, to the extent that the Act cannot be harmonized, it must be declared unconstitutional.⁵

An act of Congress forbidding trade with France during the Napoleonic Wars was rejected by the Court as a basis for seizure of a neutral ship owned by an alien, the Court saying:

[A]n act of congress ought never to be construed to violate the law of nations if any other possible construction remains, and, consequently, can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country.

⁵ As stated in *Hurst v. Triad Shipping Co.*, 554 F.2d 1237, 1245 (3d Cir.), *cert. denied*, 434 U.S. 861 (1977): "Congress might well exceed its constitutional power by bringing within the jurisdiction of an admiralty court a completely land-related accident or transaction; conversely, Congress probably could not remove from admiralty jurisdiction those types of accidents which occur on navigable water since these are conceptually, traditionally, and constitutionally admiralty matters." . . . (Citation omitted.)

Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804). This principle also supports a reading of the Foreign Sovereign Immunities Act that comports with internationally agreed principles involving the rights of neutrals on the high seas.

III. THE FOREIGN SOVEREIGN IMMUNITIES ACT SHOULD NOT BE INTERPRETED SO AS TO PRECLUDE THE EXERCISE OF JURISDICTION HEREIN.

It is possible to harmonize the Foreign Sovereign Immunities Act with the constitutional grant of admiralty jurisdiction by reference to section 1603, which defines "United States" for the purposes of the Act as including "all territory and waters, continental or insular, *subject to the jurisdiction of the United States*." 28 U.S.C. § 1603 (emphasis added). Congress could have defined the United States territorially, but chose instead to use "jurisdiction."

Although no nation has exclusive jurisdiction over the high seas, all nations may exercise jurisdiction for some purposes, including suppression of piracy and the slave trade. *See Talbot v. Janson*, 3 U.S. (3 Dall.) 133, 159-60 (1795).⁶ Moreover, in a wide range of claims arising on the high seas that are adjudicated in our courts, the courts not only provide a remedy, but also define standards of conduct, something they would not ordinarily do if the seas were distinctly within the territory of another sovereign. Thus, since the United States is defined in the Foreign Sovereign Immunities Act as including all waters subject to its jurisdiction, the high seas are included within the United States as the high seas have historically been subject to the "jurisdiction" of United States admiralty courts. If this definition of the United States is applied to section 1605 of the Act, its constitutionality would be preserved as there would be

⁶ "That *prima facie* all piracies and trespasses committed against the general law of nations, are enquirable, and may be proceeded against, in any nation where no special exemption can be maintained, either by the general law of nations or by some treaty which forbids or restrains it." *Talbot v. Janson*, 3 U.S. (3 Dall.) at 159-60.

no abrogation of the constitutional grant of admiralty jurisdiction.

If this definition of United States is applied in the instant case, the claim might well be deemed to fall within the exceptions to jurisdictional immunity embodied in section 1605(a)(5).

If, however, the statute's own definition of "United States" is rejected, a constitutional problem arises in that torts such as the one alleged herein—which would clearly fall within the admiralty jurisdiction as envisioned in the Constitution and explained by the early decisions on the scope of the judicial power in admiralty—would be withdrawn from our admiralty courts, thus impermissibly diminishing the constitutional grant of admiralty and maritime jurisdiction. Congress is without power to restrict this jurisdiction, and thus, to that extent, the Act must be declared unconstitutional.

CONCLUSION

Jurisdiction over the Petitioner herein should be sustained.

Dated: August 30, 1988

Respectfully submitted,

/s/ R. GLENN BAUER

R. Glenn Bauer
Counsel of Record

RICHARD W. PALMER
LIZABETH L. BURRELL
195 Broadway
New York, New York 10007
(212) 341-7000
Attorneys for the Maritime
Law Association of
the United States as
Amicus Curiae

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City of New York and the County of New York; I am over the age of eighteen years and not a party to the within action; my business address is: 195 Broadway, New York, New York 10007.

On August 30, 1988, I served the within Motion to File *Amicus Curiae* Brief and Brief in Support of the Respondents in re: "Argentine Republic vs. Amerada Hess Shipping Corporation and United Carriers, Inc." in the United States Supreme Court, October Term 1987, No. 87-1372;

On the Parties in said action by placing three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at New York, New York, addressed as follows:

Bruno A. Ristau
Kaplan Russin & Vecchi
1215 Seventeenth Street, N.W.
Washington, D.C. 20036
Counsel of Record for Petitioner

Douglas R. Burnett
Hill Rivkins Carey Loesberg O'Brien & Mulroy
21 West Street
New York, New York 10006
Counsel for Respondent
Amerada Hess Shipping Corporation

Raymond J. Burke, Jr.
Burke & Parsons
1114 Avenue of the Americas
New York, New York 10036
Counsel for Respondent
United Carriers, Inc.

Hon. Charles Fried, Solicitor General
Department of Justice
Washington, D.C. 20530
Counsel of Record for the
United States as *Amicus Curiae*

Dr. Frank L. Wiswall, Jr.
11870-D Sunrise Valley Drive
Reston, Virginia 22091-3303
Counsel of Record for
Amicus Curiae Republic of Liberia

James T. Lafferty, Esq.
50 Broadway, Third Floor
New York, New York 10004
Counsel of Record for
Amicus Curiae Seamen's Church
Institute

Marilyn Lytle, Esq.
Bigham Englar Jones & Houston
14 Wall Street
New York, New York 10005
Counsel of Record for
Amicus Curiae American Institute
of Marine Underwriters

Constantine G. Papavizas, Esq.
Dyer Ellis Joseph & Mills
Watergate—Suite 1000
600 New Hampshire Avenue N.W.
Washington, D.C. 20037
Counsel of Record for
Amicus Curiae American Institute of
Merchant Shipping, International
Chamber of Shipping, and Federation
of American Controlled Shipping

Christopher B. Kende, Esq.
Hill Betts & Nash
One World Trade Center
Suite 5215
New York, New York 10048
Counsel of Record for
Amicus Curiae Independent Association
of Tanker Owners

All Parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on August 30, 1988, at New York, New York.

/s/ JEFFREY A. WEISS
Jeffrey A. Weiss

MOTION FILED
AUG 30 1988

(12)
No. 87-1372

IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

ARGENTINE REPUBLIC,
v. *Petitioner,*

AMERADA HESS SHIPPING CORPORATION and
UNITED CARRIERS, INC.,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Second Circuit

**MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*
AND BRIEF *AMICUS CURIAE* OF
AMERICAN INSTITUTE OF MERCHANT SHIPPING,
INTERNATIONAL CHAMBER OF SHIPPING AND
FEDERATION OF AMERICAN CONTROLLED SHIPPING
IN SUPPORT OF RESPONDENTS**

MICHAEL JOSEPH *
THOMAS M. DYER
CONSTANTINE G. PAPAVIZAS
DYER, ELLIS, JOSEPH & MILLS
600 New Hampshire Ave., N.W.
Washington, D.C. 20037
(202) 944-3000

Attorneys for
American Institute of Merchant
Shipping, International Chamber
of Shipping and Federation of
American Controlled Shipping as
Amici Curiae

August 30, 1988

* Counsel of Record

IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-1372

ARGENTINE REPUBLIC,
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v.

AMERADA HESS SHIPPING CORPORATION and
UNITED CARRIERS, INC.,
Respondents.

**On Writ of Certiorari to the United States
Court of Appeals for the Second Circuit**

**MOTION OF
AMERICAN INSTITUTE OF MERCHANT SHIPPING,
INTERNATIONAL CHAMBER OF SHIPPING AND
FEDERATION OF AMERICAN CONTROLLED SHIPPING
FOR LEAVE TO FILE BRIEF *AMICUS CURIAE***

The American Institute of Merchant Shipping (AIMS), the International Chamber of Shipping (ICS) and the Federation of American Controlled Shipping (FACS) respectfully move for leave to file the attached brief *amicus curiae*. The consent of respondents has been granted; that of petitioner has been withheld.

Movants are associations of owners of merchant vessels. AIMS, whose members are owners of vessels documented under the laws of the United States, has twenty members owning approximately 170 vessels which comprise about one third of the aggregate capacity of the entire U.S.-flag merchant fleet.¹ ICS is an organization of some 40 national shipowners' associations in 34 countries and represents about half the free world's merchant fleet by tonnage. FACS is an association of American companies beneficially owning, controlling or managing merchant vessels, aggregating approximately 19 million deadweight tons, registered under the laws of Liberia, Panama, Honduras and the Bahamas.

As owners of merchant vessels, movants have a substantial interest in the preservation of the well-recognized freedom to navigate the high seas.² An unprovoked attack against a neutral merchant vessel, such as that allegedly committed by the Argentine Republic against the merchant vessel *HERCULES* during the Falklands/Malvinas War, is a direct assault upon that freedom.

To safeguard and reaffirm that freedom, an offender, even if it is a sovereign, must be required either to provide compensation or to defend its actions in an appropriate forum. Although Argentina does not deny that an unprovoked attack occurred or that such an attack is a

¹ Amerada Hess Corporation, the parent of respondent Amerada Hess Shipping Corporation, is a member of AIMS. One member of AIMS and one member of FACS have abstained with respect to this motion.

² Freedom of the high seas, including freedom of navigation, is guaranteed by the Convention on the High Seas, *done* at Geneva, April 29, 1958, 13 U.S.T. 2312, T.I.A.S. 5200, 450 U.N.T.S. 82, Art. 2, and the United Nations Convention on the Law of the Sea, *done* December 10, 1982, U.N. Pub. E. 83.V.5 (1983), Art. 87, reprinted in 21 Int'l Legal Mat. 1261 (1983).

violation of international law, it has refused either to provide or submit to any forum or to provide compensation to the owners and charterers of the *HERCULES*. If Argentina succeeds, freedom of navigation will be endangered.

Apparently because most, if not all, sovereigns have previously recognized their obligation under similar circumstances to provide either compensation or a forum, there is little judicial precedent relevant to the issues presented by this case.³ At the same time, the case is of special importance to movants because of the significant number of deliberate attacks against merchant vessels in recent years, specifically those related to the Iran-Iraq War.

Movants have a special interest in the issue of *in personam* jurisdiction raised by petitioner. Their interest extends beyond the jurisdictional implications of belligerent activities by sovereign nations; resolution of the issue may also affect their ability to obtain compensation for other purposeful acts against merchant vessels on the high seas. Movants believe that the relationships among merchant vessels, their trading activities, their owners and their countries of registry, as commonly understood within the world maritime community, are

³ We have been unable to locate any record of a prior instance in which a sovereign has refused to compensate or provide a forum for its unjustified attacks on neutral vessels. Even Nazi Germany maintained a prize court where neutrals could seek compensation for attacks by German armed forces on merchant vessels on the high seas. See C. Colombos, *A Treatise on the Law of Prize* 40-43, 64-65 (1949).

highly relevant to the *in personam* jurisdiction issue and that movants are well qualified to contribute to the Court's understanding thereof.

Respectfully submitted,

MICHAEL JOSEPH
THOMAS M. DYER
CONSTANTINE G. PAPAIVAS
DYER, ELLIS, JOSEPH & MILLS
600 New Hampshire Ave., N.W.
Washington, D.C. 20037
(202) 944-3000

Attorneys for

*American Institute of Merchant
Shipping, International Chamber
of Shipping and Federation of
American Controlled Shipping as
Amici Curiae*

August 30, 1988

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-1372

ARGENTINE REPUBLIC,
Petitioner,
 v.

AMERADA HESS SHIPPING CORPORATION and
 UNITED CARRIERS, INC.,
Respondents.

**On Writ of Certiorari to the United States
 Court of Appeals for the Second Circuit**

**BRIEF AMICUS CURIAE OF
 AMERICAN INSTITUTE OF MERCHANT SHIPPING,
 INTERNATIONAL CHAMBER OF SHIPPING AND
 FEDERATION OF AMERICAN CONTROLLED SHIPPING
 IN SUPPORT OF RESPONDENTS**

This brief *amicus curiae* addresses only the issue of specific personal jurisdiction presented when suit is brought against a nonresident based upon an intentional tort committed against a vessel on the high seas. It discusses three independent bases for a nation's assertion of such jurisdiction—where the vessel is registered under the laws of such nation, where its owner is a national thereof, or where, as the record in the present case indicates, the vessel is engaged in the commerce of such nation at the time of the commission of the tort. Al-

though *amici* believe that each of these bases is equally sufficient for the exercise of personal jurisdiction (if such assertion is otherwise fair and reasonable), this brief will place greater focus upon the matters of vessel registration and ownership, leaving to respondents a fuller discussion of the matter of the commerce in which the vessel was engaged.

SUMMARY OF ARGUMENT

A person who intentionally commits an act with a reasonably foreseeable effect within a jurisdiction may be required to account before the courts of that jurisdiction for that single act, so long as such accounting is otherwise fair and reasonable under the circumstances. An armed attack upon a neutral merchant vessel has a direct and foreseeable effect upon the owner of the vessel and the commerce in which the vessel is engaged. It is reasonably foreseeable that the effect occurs within the jurisdiction of the sovereign of which the owner is a national and that in whose commerce the vessel was engaged. Frequently either of these may be the country in which the vessel is registered and whose flag it flies. It is commonly understood, however, that vessels flying the flags of certain well-known "open-registry" countries are owned by nationals of countries other than those designated by their respective flags and are almost always engaged in trade between countries other than the flag state.

The exercise of personal jurisdiction in the present case is otherwise fair and reasonable because (1) Argentina's burden of defending in the United States is insubstantial and of its own making, (2) the United States has a strong interest in protecting its commerce, (3) Argentina has denied respondents a forum in which to obtain relief, (4) commerce is a practical way of apportioning personal jurisdiction on the high seas where no state has exclusive jurisdiction, and (5) the policy to be

furthered by the exercise of personal jurisdiction—freedom of the high seas—is a most fundamental international social policy.

ARGUMENT

United States courts have specific personal jurisdiction over a person who commits an intentional tort on the high seas against a vessel which is registered under the laws of, or owned by nationals of, the United States or, as in the present case, which is engaged in the commerce of the United States and, as here, the assertion of such jurisdiction is otherwise fair and reasonable.

A single purposeful act by the defendant, which has a direct, substantial and foreseeable effect in the forum, is sufficient for the exercise of specific personal jurisdiction even if the defendant has no other contacts with the forum, so long as the exercise of jurisdiction is otherwise fair and reasonable.¹ Where, for example, a California court asserted personal jurisdiction over a non-resident who had committed alleged defamatory acts in Florida, the Court observed:

[P]etitioners are not charged with mere untargeted negligence. Rather, their intentional, and allegedly tortious, actions were expressly aimed at California And they knew that the brunt of . . . [the] injury would be felt by respondent in the State in which she lives and works Under the circumstances, petitioners must "reasonably anticipate being haled into court there"

Calder v. Jones, 465 U.S. 783, 789-90 (1984), quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286,

¹ This brief does not address the issue of general personal jurisdiction which is addressed by the Independent Association of Tanker Owners in its *amicus curiae* brief. We address only the issue of specific personal jurisdiction, which, unlike general jurisdiction, is limited to claims arising from a contact with the forum. See *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 414 nn. 8, 9 (1984).

297 (1980).² The *Restatement (Third) of the Foreign Relations Law of the United States*, § 421(2)(j) (1988), states the principle in the international context as follows:

[A] state's exercise of jurisdiction to adjudicate with respect to a person or thing is reasonable if, at the time jurisdiction is asserted

* * *

the person, whether natural or juridical, has carried on outside the state an activity having a substantial, direct, and foreseeable effect within the state, but only in respect of such activity.³

² See also *Kulko v. California Superior Court*, 436 U.S. 84, 96 (1978); *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957); *Waffenschmidt v. MacKay*, 763 F.2d 711, 720 (5th Cir. 1985) (construing Mississippi law); *Burt v. Board of Regents of University of Nebraska*, 757 F.2d 242, 244-45 (10th Cir. 1985), cert. granted sub nom. *Connally v. Burt*, 474 U.S. 1004 (1985), vacated on other grounds, 475 U.S. 1063 (1986); *Gilbert v. DaGrossa*, 756 F.2d 1455, 1459 n.4 (9th Cir. 1985); *Great Western United Corp. v. Kidwell*, 577 F.2d 1256, 1266-67 (5th Cir. 1978) ("Very little purposeful activity is necessary to satisfy the minimum contacts requirement."), rev'd on other grounds sub nom. *Leroy v. Great Western United Corp.*, 443 U.S. 173 (1979); *Restatement (Second) of Conflict of Laws* § 37 (1971); R. Casad, *Jurisdiction in Civil Actions* ¶ 2.05 (1983).

³ It may be argued that the physical damage sustained by a vessel is the only legally cognizable "effect" for purposes of personal jurisdiction. See, e.g., *Carty v. Beech Aircraft Corp.*, 679 F.2d 1051, 1063-65 (3d Cir. 1982). While such a limitation might be reasonable with respect to negligent conduct, it should not be extended to intentional torts, nor to conduct committed outside the territory of any sovereign. A vessel on the high seas is not within any sovereign's territorial jurisdiction. See *The Vincennes*, 20 F.2d 164, 172 (E.D.S.C. 1927). In the only case we have found which has considered the matter with respect to vessels on the high seas, *In the Matter of Rio Grande Transport, Inc.*, 516 F. Supp. 1155, 1162-63 (S.D.N.Y. 1981), rev'd and remanded on other grounds 770 F.2d 262 (1985), it was decided that the financial effect on the corporate owner due to a collision involving the owner's vessel is the relevant effect for purposes of the commercial activity exception

To determine whether the exercise of jurisdiction in a given case is otherwise fair and reasonable, a court must weigh the factors cited in *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, —, 94 L.Ed.2d 92, 105 (1987), discussed *infra* at 12.

A. Foreseeable Effect in the Forum. There is little question but that the effect within the country which registers a merchant vessel which is attacked is direct, substantial and foreseeable.⁴ That effect, however, does

of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1330, 1602-1611. The "direct effect" standard of that exception was intended in part to ensure sufficient contacts for the exercise of personal jurisdiction. H.R. Rep. No. 1487, 94th Cong., 1st Sess. 13, reprinted in 1976 U.S. Code Cong. & Ad. News 6605, 6612; compare Note, *Direct Effect Jurisdiction under the Foreign Sovereign Immunities Act of 1976*, 13 N.Y.U. J. Int'l L. & Pol. 571, 581 (1981).

⁴ That the flag state has primary jurisdiction over the vessels it registers is an axiom of international law.

Perhaps the most venerable and universal rule of maritime law . . . is that which gives cardinal importance to the law of the flag. Each state under international law may determine for itself the conditions on which it will grant its nationality to a merchant ship, thereby accepting responsibility for it and acquiring authority over it.

Lauritzen v. Larsen, 345 U.S. 571, 584 (1953); see also *McCulloch v. Marineros de Honduras*, 372 U.S. 10, 20 (1963).

Jurisdiction over a vessel extends to persons affecting the vessel. The *Restatement (Third) on Foreign Relations Law*, § 421(2)(f), provides:

In general, a state's exercise of jurisdiction to adjudicate with respect to a person or thing is reasonable if, at the time jurisdiction is asserted . . . a ship . . . to which the adjudication relates is registered under the laws of the state.

An intentional tort committed against a vessel would seem clearly to "relate" to the vessel. See also *United States v. Rogers*, 150 U.S. 249, 260 (1893) ("The general rule is that the country to which the vessel belongs will exercise jurisdiction over all matters affecting the vessel.").

not foreclose the possibility of foreseeable effects within other jurisdictions. An attack upon a merchant vessel on the high seas also has a direct, substantial and foreseeable effect within the country of which the owners of the vessel are nationals and within the country in whose commerce the vessel is engaged when attacked.

There is no question but that an armed attack upon a neutral vessel on the high seas is a purposeful act.⁵ Damage to a merchant vessel necessarily results in financial injury to its owner and in disruption of the commerce in which it is engaged. It is reasonably foreseeable that the places in which those effects will be felt include the country in which the vessel is registered, that of which its owner is a national and that in whose commerce the vessel was engaged at the time of the attack.⁶ While the HERCULES was not registered under the laws of the United States, the record contains allegations that it was engaged in the commerce of the United States at the time of the attack (JA20) and is silent as to the nationality of its ultimate owners. To the extent either country is the United States, the effect within the United States should be sufficient to support the exercise of personal jurisdiction over Argentina.⁷ That the location of that effect was reasonably foreseeable is evident

⁵ "The term 'high seas' means all parts of the sea that are not included in the territorial sea or in the internal waters of a State." Convention on the High Seas, *done* at Geneva, April 29, 1958, 13 U.S.T. 2312, T.I.A.S. 5200, 450 U.N.T.S. 82, Art. 1.

⁶ This brief is not intended to canvass the universe of relationships which, in addition to the vessel's registration, ownership and commerce, may be sufficient to support specific personal jurisdiction. Nor is this brief intended to address the right of an alien owner of a foreign-flag vessel to sue in the United States for a tort committed on the high seas where there is a basis for the exercise of personal jurisdiction.

⁷ The effect within the country having "effective control" over the vessel may also be sufficient. See notes 19, 30 *infra*.

from the commonly-understood realities of international vessel ownership and international commerce.⁸

1. *International Vessel Ownership*. As a matter of international law, merchant vessels which operate on the high seas are required to have a nationality. C. Colombos, *The International Law of the Sea* § 331 (6th ed. 1969).⁹ "Each State shall fix the conditions for the grant of its nationality to ships . . . [, and s]hips shall sail under the flag of one State only." Geneva Convention on the High Seas, Art. 5(1), 6(1).¹⁰

Although the laws pertaining to vessel registration requirements vary from country to country, "[t]he laws of most states authorize only vessels owned by nationals to fly the state's flag." *Restatement (Third) of the Foreign Relations Law* § 501, n.4.¹¹ The owner of a merchant

⁸ That Argentina may have had actual knowledge that the HERCULES was a "U.S. interest" vessel and was engaged in the commerce of the United States (JA60) provides additional justification for the exercise of personal jurisdiction, but it is not essential thereto.

⁹ "The entire legal system which States have evolved for the regulation of the use of the high seas is predicated on the possession by each vessel of a connection with a State having a recognized maritime flag." R. Rienow, *Nationality of a Merchant Vessel* 13 (1937).

¹⁰ See also United Nations Convention on Conditions for Registration of Ships, *done* February 7, 1986, U.N. Conf. on Trade and Dev. Doc. TD/RS/CONF/23 (March 13, 1986), Art. 4(1), 2(1).

¹¹ Although the United States will not register a vessel that is not owned by a United States citizen, 46 U.S.C. § 12102, a corporation can qualify as a citizen for vessel registration purposes even if its stock is owned by aliens but it must meet a number of requirements giving it an American character. 46 C.F.R. § 67.03-9 (1987). Because of those and other requirements, U.S.-flag vessels are rarely owned by corporations owned by foreign nationals.

vessel is, however, not necessarily a national of the flag state. Some countries, particularly so-called "open-registry" countries,¹² register vessels that are not owned by nationals of those countries.¹³ An open-registry flag can be defined as

the flag of any country allowing the registration of foreign-owned and foreign-controlled vessels under condition which, for whatever reasons, are convenient and opportune for the persons who are registering the vessels.

B. Boczek, *Flags of Convenience* 2 (1962).¹⁴

Although open registries have existed at least since the end of World War I, it was not until World War II, and particularly the 1950s, that sizeable numbers of vessels were registered in open-registry countries. *OECD Study on Flags of Convenience*, reprinted in 4 J. Mar. L. & Com. 231, 233 (1973).¹⁵ Today, the major open-registry

¹² Particularly in the past decade, the terms "open registry" and "open register" have been used to describe those vessel registries formerly commonly referred to by such non-neutral terms as "flags of convenience" and "flags of necessity."

¹³ "That a state may attribute its national character only to vessels owned by its nationals has never been a requirement of international law." McDougal, Burke & Vlasic, *Maintenance of Public Order at Sea*, 14 Am. J. Int'l L. 25, 111 (1960).

¹⁴ Open-registry states generally (1) permit ownership or control of vessels by non-nationals, (2) tax income from the operation of vessels at a relatively low level, (3) derive significant income from registration charges but have no national requirement for all the vessels they register, (4) permit relatively easy registration access, (5) permit manning of vessels by non-nationals, and (6) do not have the naval power to control effectively the vessels they register. See United Kingdom Committee of Inquiry into Shipping at 51 (1970), noted in *Restatement (Third) of the Foreign Relations Law* § 501, n.7.

¹⁵ See generally R. Carlisle, *Sovereignty for Sale* (1981).

states, Liberia and Panama, have under their registries the two largest fleets in the world.¹⁶ *Lloyd's Register of Shipping: Statistical Tables* 6 (1987). Almost half of all open-registry tonnage is registered in Liberia and about one third in Panama.¹⁷ About 1,500 vessels fly the flag of Liberia alone. *Id.* United States nationals own or control almost 28 percent of the tonnage registered in Liberia.¹⁸ The open-registry vessels owned by United States nationals are employed in the international bulk trades and other specialized trades where U.S.-flag ves-

¹⁶ The world's largest fleets as of 1987 in deadweight tons (DWT) were:

Liberia	97,957,869
Panama	70,435,824
Japan	54,669,378
Greece	42,775,945
U.S.A.	29,111,255
U.S.S.R.	28,555,746

Lloyd's Register of Shipping: Statistical Tables at 5-7. The United States tonnage includes Great Lakes vessels and the Reserve Fleet intended for national emergency. *Id.* at 3.

¹⁷ The top five open-registry fleets, with their respective percentage shares of the total tonnage registered in those countries, as of July 1, 1987 were:

Liberia	45.7%
Panama	32.9%
Cyprus	12.7%
Bahamas	7.3%
Bermuda	1.4%

U.N. Conf. on Trade and Dev., *Review of Maritime Transport: Beneficial Ownership of Open Registry Fleets*, TD/B/C.4/309/Add.1 at 6 (November 24, 1987).

¹⁸ *Id.* The relationship between the United States and Liberia is long standing both in general and with regard to shipping. United States nationals are credited with providing the impetus for Liberia's open-registry system. Carlisle, *Sovereignty for Sale* at 115 *et seq.*

sels, in the absence of subsidy or other governmental supports, normally cannot compete because of higher costs.¹⁹

Given the prevalence of open-registry vessels in world trade, it is reasonably foreseeable that an act affecting such a vessel will directly affect a national of a country other than the flag state.²⁰ The identity of open-registry countries, particularly the two major ones, is well known, as is the fact that vessels documented in open-registry countries are owned by nationals of other countries. Consequently, the foreseeable effect should not be limited to the nation whose flag the vessel flies.²¹

2. *International Commerce.* The United States depends heavily on vessels to carry its foreign trade. U.S. Bureau

¹⁹ The Liberian, Panamanian, Bahamian and Honduran vessels beneficially owned by Americans are deemed by United States defense officials to be under "Effective U.S. Control" and thus available to the United States during a national emergency. See, e.g., Commission on Merchant Marine and Defense, *First Report Findings of Fact and Conclusions* at 29 (September 30, 1987); note 30 *infra*.

²⁰ When the owner of a vessel is a corporation or similar business entity, its locus as well as the nationality of its owners may be significant. Given that the purpose of the "effects" doctrine is to protect persons within a sovereign's territory who are affected by an action committed outside the territory, it is useful to inquire whether a corporation is sufficiently present in the sovereign to be deemed to have sustained an actual loss in that territory. See Note, *Effects Jurisdiction Under the Foreign Sovereign Immunities Act and the Due Process Clause*, 55 N.Y.U. L. Rev. 474, 512-13 (1981). The principal place of business of a corporation, for example, would seem to be a sufficient presence in most cases.

²¹ The personal jurisdiction rule proposed, that the state of the nationality of the owner of a vessel may be an appropriate forum to adjudicate disputes arising from acts affecting such a vessel, is unrelated to any definition of an alien under the Alien Tort Statute, 28 U.S.C. § 1350. The Alien Tort Statute defines subject matter jurisdiction, not personal jurisdiction. See *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975).

of the Census, *Highlights of U.S. Export and Import Trade*, Report FT990 at B-5, C-5 (December 1987). Open-registry vessels carry a large proportion of the foreign waterborne commerce of the United States in particular and of world commerce in general.²² Vessels registered in Liberia and Panama together carried almost 40 percent of United States imports and exports by tonnage in 1985. U.S. Dept. of Transportation, *United States Oceanborne Foreign Trade Routes* 187 (December 1987). In contrast, U.S.-flag vessels transported only 4.3 percent of U.S. oceanborne foreign trade in that same year. *Id.* at 187. Most of the commerce carried by vessels registered in open-registry countries is carried in so-called "cross-trades" unconnected with those countries.²³

Given the nature of oceanborne trade, it is reasonably foreseeable that an attack upon a vessel will affect the commerce of some country. Given the facts that relatively little of United States commerce is carried by U.S. flag vessels, and that it is well known that United States commerce is conducted by vessels registered by many nations including open-registry countries, the foreseeability of the effect on United States commerce should not be related to flag.²⁴

²² Open-registry tankers, like the *HERCULES*, carry a very large proportion of United States oceanborne trade in petroleum and petroleum products. In 1985, tankers registered in Liberia and Panama carried about 50 percent of that trade; U.S.-flag tankers carried about 3 percent. U.S. Dept. of Transportation, *United States Oceanborne Foreign Trade Routes* at 199.

²³ Neither Liberia nor Panama is in the top thirty countries in volume of oceanborne trade with the United States. See *id.* at 289.

²⁴ The effect within the United States and the foreseeability of that effect should not depend on whether a vessel is in the domestic or foreign commerce of the United States. The *HERCULES* happened to be on a voyage from a United States possession to the

B. Fairness and Reasonableness in the Present Case.

Whether the exercise of personal jurisdiction in a given case is fair and reasonable depends on:

[1] the burden on the defendant, [2] the interests of the forum state, and [3] the plaintiff's interest in obtaining relief. It must also weigh in its determination [4] "the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and [5] the shared interest of the several States in furthering fundamental substantive social policies."

Asahi Metal, 480 U.S. at—, 94 L.Ed.2d at 105, quoting *World-Wide Volkswagen Corp.*, 444 U.S. at 292.

1. *Burden on the Defendant.* Any burden on Argentina to defend in the United States is insubstantial. Because the significant facts are not in dispute, it is likely that the case will be decided upon a dispositive motion. Under similar circumstances a foreign corporation would have sufficient resources so that the case would not be unduly burdensome. See *Gates Learjet Corp. v. Jensen*, 743 F.2d 1325, 1333 (9th Cir. 1984). The Argentine Republic is certainly no stranger to the United States. See *Amicus curiae* Brief of International Association of Independent Tanker Owners, Pt. III. And to the extent a defendant, who purposefully and violently attacks a merchant vessel on the high seas, is burdened by defending in some state, that burden is self-inflicted and should be outweighed by other factors favoring the exercise of jurisdiction.

2. *Interest of the Forum State.* The state in whose commerce the vessel is engaged has an interest in pro-

United States when it was attacked. In either case, a basis for personal jurisdiction would exist because there would be an effect within the United States.

tecting its commerce.²⁵ That interest is well recognized.²⁶

3. *Plaintiff's Interest in Obtaining Relief.* The state whose commerce is affected may be the only possible forum if the defendant is a sovereign which, like Argentina, refuses to acknowledge its obligation to provide compensation or a forum. It may be appropriate for the courts of that state to abstain from exercising jurisdiction over a defendant state which provides either just compensation or a forum. But in the absence of such accommodation, there is no reason to abstain.

4. *Judicial System's Interest in Obtaining Efficient Resolution of Controversies.* While no state has exclusive jurisdiction over the high seas, every state has the right to assert jurisdiction within reason over persons for acts committed on the high seas. *Maul v. United States*, 274 U.S. 501, 511 (1927) ("[t]he high sea is common to all

²⁵ A forum "has a significant interest in redressing injuries that actually occur within the State." *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 776 (1984). Similarly, a forum "has a manifest interest in providing effective means of redress for its residents." *McGee v. Int'l Life Ins. Co.*, 355 U.S. at 223.

²⁶ Congress has recognized the interest of the United States in the protection of vessels engaged in United States commerce. See, e.g., 46 U.S.C. app. § 1283 (grants permission to the Secretary of Transportation to insure "vessels engaged in transportation in the waterborne commerce of the United States"); 46 C.F.R. Part 307 (1987) (requires "certain non-U.S.-flag vessels in U.S. foreign commerce" to participate in the Automated Mutual-Assistance Vessel Rescue System or AMVER).

The ownership state's interest is also well recognized. "The state or states of which the ultimate owners of the vessel are citizens have an interest in protecting their nation's investments." Note, *The Effect of United States Labor Legislation on the Flag of Convenience Fleet*, 69 Yale L. J. 498, 505 (1960). "[T]he state has not only the right but even the duty of protecting and defending its nationals abroad by every means authorized by international law." *The Costa Rica Packet* (1897), 5 Moore, *International Arbitrations* 4948 (1898).

nations and foreign to none").²⁷ Consequently, the issue of personal jurisdiction for an act occurring on the high seas is not a matter of choosing between sovereigns each having personal jurisdiction. Rather, it is a matter of deciding whether any sovereign may assert jurisdiction. If no sovereign has personal jurisdiction, there will be a judicial vacuum, which hardly accords with the interest of the international community in resolving controversies efficiently. See Colombos, *The International Law of the Sea* at 67. Such a vacuum would countenance anarchy on the high seas and essentially preclude the peaceful resolution of disputes arising out of events occurring there.

5. *Substantive Social Policies.* Finally, freedom of the high seas is one of the most fundamental and universally-recognized international social policies.²⁸ Consequently, the international community has a heavy interest in policing violations of the freedom of the seas.

C. *Considerations of Jurisdiction to Prescribe and Enforce.* Allowing the ownership state, or the state in whose commerce a vessel is engaged, to exercise personal jurisdiction over a person committing an intentional act affecting a vessel would not give that state general jurisdiction over vessels owned by its nationals by reasons of that ownership or commerce. Personal jurisdiction, or jurisdiction to adjudicate, is distinct from jurisdiction to prescribe and to enforce.²⁹ Jurisdiction to prescribe and

²⁷ See also *The Vines*, 20 F.2d at 172 ("The high seas . . . are common property of all nations.")

²⁸ Most states with identifiable interests in shipping, including the United States and Argentina, have ratified the Geneva Convention on the High Seas and/or the United Nations Convention on the Law of the Sea, done December 10, 1982, U.N. Pub. E. 83.V.5 (1983), Art. 87, reprinted in 21 Int'l Legal Mat. 1261 (1983), both of which guarantee freedom of the high seas.

²⁹ Jurisdiction to prescribe is jurisdiction "to make . . . law applicable to the activities, relations, or status of persons, or the interests of persons in things." Jurisdiction to enforce is jurisdiction

to enforce is usually reserved exclusively for the flag state.³⁰ There is nothing exclusive about personal jurisdiction.

The personal jurisdiction requirement . . . represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty.

Insurance Corp. of Ireland v. Compagnie des Bauxites, 456 U.S. 694, 702 (1982). When the flag state, ownership state and "commerce state" happen to be different, as is usually the case where an open-registry vessel is involved, each state may have basis for asserting personal jurisdiction. Whether one state is more appropriate will depend on venue and the doctrine of *forum non conveniens*, not upon personal jurisdiction.

CONCLUSION

For the foregoing reasons, the American Institute of Merchant Shipping, the International Chamber of Shipping and the Federation of American Controlled Shipping urge the Court to hold that United States courts have personal jurisdiction over a foreign sovereign with respect to claims arising out of the purposeful attack on

"to induce or compel compliance or to punish noncompliance with . . . laws or regulations." Jurisdiction to adjudicate is jurisdiction "to subject persons or things to the process of . . . courts or administrative tribunals." *Restatement (Third) of the Foreign Relations Law* § 401.

³⁰ There are, however, at least two doctrines which ascribe jurisdiction to prescribe and enforce to states other than the flag state under certain circumstances. One is known as "genuine link." See U.N. Conf. on Trade and Dev., *Economic Consequences of the Existence or Lack of a Genuine Link Between Vessel and Flag of Registry*, TD/B/C.4.168/Add.1 (December 9, 1977); McDougal, Burke & Vlasic, *Maintenance of Public Order at Sea*, 54 Am. J. Int'l L. at 97 *et seq.* The other is known as "effective control." See Carlisle, *Sovereignty for Sale* Ch. 11; Watts, *The Protection of Merchant Ships*, 1957 British Yearbook Int'l L. 52, 84; but see H. Meyers, *The Nationality of Ships* 66 (1967).

the high seas of a neutral vessel engaged in the commerce of the United States and that personal jurisdiction over Argentina in the present case is otherwise fair and reasonable. We also urge the Court to recognize that jurisdiction may also be based upon the registration or ownership of the vessel involved.

Respectfully submitted,

MICHAEL JOSEPH *

THOMAS M. DYER

CONSTANTINE G. PAPAVIZAS

DYER, ELLIS, JOSEPH & MILLS

600 New Hampshire Ave., N.W.

Washington, D.C. 20037

(202) 944-3000

Attorneys for

*American Institute of Merchant
Shipping, International Chamber
of Shipping and Federation of
American Controlled Shipping as
Amici Curiae*

August 30, 1988

* Counsel of Record

MOTION FILED
AUG 30 1988

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On Writ of Certiorari To The United States
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MOTION OF
THE INTERNATIONAL HUMAN
RIGHTS LAW GROUP
FOR LEAVE TO FILE BRIEF
OF AMICUS CURIAE
AND BRIEF OF AMICUS CURIAE
THE INTERNATIONAL HUMAN RIGHTS LAW GROUP

Amy Young
Larry Garber
International Human
Rights Law Group
733 15th Street, N.W.
Suite 1000
Washington, D.C. 20005
(202) 639-8016
Of Counsel

Harry A. Inman*
Steven M. Schneebaum
Patton, Boggs, & Blow
2550 M Street, N.W.
Washington, D.C. 20037
(202) 457-6000

*Counsel of Record

Attorneys for Amicus

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MOTION OF
THE INTERNATIONAL HUMAN RIGHTS LAW
GROUP FOR LEAVE TO FILE BRIEF
AMICUS CURIAE

Pursuant to Rule 36.3 of the Rules of this Court, the International Human Rights Law Group (the Law Group) moves for leave to file the attached brief Amicus Curiae. The Law Group is a non-profit organization of international lawyers and scholars, which, through litigation, publication, and other public activism, seeks to promote respect for human rights norms in all nations, including the United States.

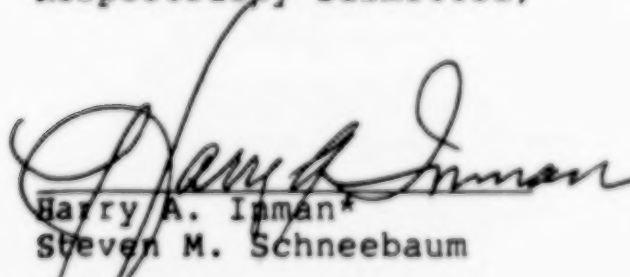
The Law Group has participated as Amicus in litigation concerning the use of international human rights norms in domestic courts, including such cases as Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980), on remand, 577 F. Supp. 860 (E.D.N.Y. 1984) and many others. Amicus therefore has a familiarity with and a perspective on the incorporation of international law into the law of the United States, and on 28 U.S.C. § 1350

in particular, that may aid the Court in deciding this case.

The enclosed Brief of the Law Group is limited to those issues of which Amicus has some litigation experience and substantive expertise. Amicus is not aware of any other presentation of these arguments to the Court.

Counsel for Petitioner, and counsel for Respondent United Carriers, Inc., have both declined to consent to the filing of the enclosed Brief, necessitating this motion.

Respectfully submitted,



Harry A. Inman*
Steven M. Schneebaum

PATTON, BOGGS & BLOW
2550 M Street, N.W.
Washington, D.C. 20037
(202) 457-6300

*Counsel of Record

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No. 87-1372

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

ARGENTINE REPUBLIC,
Petitioner,

vs.

AMERADA HESS SHIPPING CORPORATION and
UNITED CARRIERS, INC.

Respondents.

On Writ Of Certiorari To The
United States Court Of Appeals For
The Second Circuit

BRIEF OF AMICUS CURIAE
THE INTERNATIONAL HUMAN RIGHTS LAW GROUP

INTEREST OF AMICUS

The International Human Rights Law Group is a non-profit public interest organization incorporated in the District of Columbia. Its goals include the development and promotion of legal norms of international human rights. To that end, the Law Group has represented individuals and organizations, on a pro bono basis, before United States and international tribunals.

In particular, the Law Group has appeared as Amicus Curiae in a number of U.S. cases applying and interpreting the Alien Tort Claims Act, 28 U.S.C. § 1350, notably Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980), on remand, 577 F. Supp. 860 (E.D.N.Y. 1984). It is especially concerned that the caselaw developing § 1350 be consistent, coherent, and effective in implementing the international law of human rights.

SUMMARY OF ARGUMENT

The Foreign Sovereign Immunities Act (FSIA) provides the exclusive basis for federal jurisdiction over Petitioner. The FSIA provides a number of circumstances in which jurisdiction over foreign sovereigns may be taken. Whether the FSIA conditions are met in this case, however, has not been briefed in the courts below and is not part of this Court's grant of certiorari.

Resolution of the case at bar, therefore, should be by virtue of remand to the lower courts to consider whether jurisdiction may be asserted consistently with the FSIA. It is not necessary--and indeed would be inappropriate--for the Court to address the meaning or scope of 28 U.S.C. § 1350, a statute of tremendous importance in giving domestic legal content to the international law of human rights.

ARGUMENT

I. Introduction

This case concerns the narrow question whether the Alien Tort Claims Act, 28 U.S.C. § 1350, can be the basis for federal civil jurisdiction over a foreign sovereign defendant, notwithstanding the provisions of the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602-9.

Respondents are the owner and charterer of S/T HERCULES, which was allegedly destroyed after an unprovoked attack by Petitioner's military forces, on the high seas, during the war over the Falkland Islands in June 1982. The HERCULES, of Liberian registry^{1/}, was

^{1/} Normally, The Jones Act requires that movements of cargo between U.S. ports be in U.S.-flagged vessels. 46 U.S.C. § 883. There is an exception in the Act, however, covering the Virgin

Continued

returning in ballast from an oil refinery in the U.S. Virgin Islands to Valdez, Alaska when she was struck.

Respondents brought this action in the United States District Court for the Southern District of New York, asking the court to take jurisdiction under 28 U.S.C. § 1350. Petitioner asserted immunity under 28 U.S.C. §§ 1330 and 1604, and the district judge sustained that claim. 638 F. Supp. 73 (S.D.N.Y. 1986). Judge Carter held that the Foreign Sovereign Immunities Act (FSIA) is the exclusive basis for jurisdiction over a foreign state, that Argentina is entitled to immunity unless one of the waiver provisions of the FSIA applies, and that, on the facts as presented,

Islands, the location of the largest oil refinery in the Western world. 46 U.S.C. § 877. See American Maritime Association v. Blumenthal, 590 F.2d 1156 (D.C. Cir. 1978), cert. den., 441 U.S. 943 (1979).

there was no support for the claim that Petitioner's immunity was waived.

Over the dissent of Judge Kearse, the U.S. Court of Appeals for the Second Circuit reversed. 830 F.2d 421 (2d Cir. 1987). Chief Judge Feinberg, writing for the majority, opined that the FSIA does not apply when a sovereign has violated international law, at least in a non-commercial context, and that 28 U.S.C. § 1350--which contains no express or implied exclusion of actions against sovereigns--provides a basis for jurisdiction so long as its three criteria are met: the plaintiff must be an alien, the action one "in tort only," and the conduct at issue "in violation of the law of nations." All three, he found, were satisfied; the last because an unprovoked attack on an unarmed, neutral vessel is prohibited by both customary law and treaties to which the

United States and Argentina are parties.

After the Second Circuit declined to rehear the case, this Court granted certiorari. 108 S.Ct. 1466 (1988).

II. The FSIA is the Exclusive Basis for Federal Court Jurisdiction over Foreign Sovereigns; However, It Does Not Necessarily Follow That This Case Must Be Dismissed on Remand.

Amicus the International Human Rights Law Group agrees with Petitioner and the United States that in the circumstances presented by this case, the FSIA is the exclusive basis for jurisdiction. See Brief for the United States As Amicus Curiae Supporting Petitioner at 8-23; Brief for Petitioner at 18-29. However, Amicus submits that it does not follow that the case must be dismissed on remand.

A. The Exclusivity of the FSIA

Chapter 85 of Title 28, United States Code, defines the jurisdiction of the district courts. Since those courts

are courts of special jurisdiction, their authority to hear cases is limited by these provisions, which carry out the Constitutional grant of the judicial power. Article III, § 2(1).

Actions against foreign states are governed by 28 U.S.C. § 1330, and in particular by the following:

(a) The district courts shall have original jurisdiction without regard to the amount in controversy of any nonjury civil action against a foreign state ... as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under §§ 1605-1607 of this title or under any applicable international agreement.

28 U.S.C. § 1330(a). Sections 1605-1607 provide an itemized list the categories of cases in which foreign sovereigns are not entitled to immunity.

Given this framework, it is very difficult to argue that there can be federal jurisdiction over Petitioner if none of the waiver conditions set out in § 1330 is met. Whether or not Petitioner's attack on the HERCULES was--as Amicus believes that, if proved, it was--a violation of the rights of a neutral ship to ply the high seas whether in peacetime or not, that fact cannot determine the power of the federal courts to decide the instant case. Amicus submits that the Second Circuit was simply incorrect in describing as "[t]he modern view" the proposition that "sovereigns are not immune from suit for their violations of international law." 830 F.2d at 425.^{2/} Indeed, the fact that no

^{2/} The Second Circuit confused immunity from international responsibility with immunity from suit in another nation's domestic

reported judicial decision discussing the FSIA articulates that conclusion militates most strongly against the Second Circuit's view.

Not only is the Second Circuit's opinion regarding the exclusivity of the FSIA as a jurisdictional basis inconsistent with the statute itself, and with the caselaw, but it is logically untenable. If proof that a foreign sovereign violated international law vitiated its immunity, then the concept of sovereign immunity would be destroyed, since in virtually every case where a foreign state is a defendant a plaintiff can find some way of alleging a violation of international law. Thus the determination of whether the defendant is immune from suit would depend

courts. See F.L. Kirgis, Jr., Alien Tort Claims, Sovereign Immunity and International Law in U.S. Courts, 82 Am. J. Int'l L. 323, 325 (1988).

upon the outcome on the merits: if in the end international law was violated, the sovereign would ipso facto lose its immunity and be liable, but if after trial the violation was not proved, then the state would be immune from judicial process.

A system in which immunity from suit is logically dependent upon the outcome of an action on the merits is senseless. Nor is there a single reported case that supports the view that, in passing the FSIA, Congress created such a framework. Certainly nothing in this Court's major decision interpreting the FSIA--Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480 (1983)--suggests that sovereign immunity does not protect a foreign state alleged to have violated international law. This Court said through Chief Justice Burger that Congress "clearly intended" the

FSIA to govern "all actions against foreign sovereigns," Verlinden, 461 U.S. at 491 n. 16, emphasis added, and Amicus sees no way of reconciling the opinion of the court below with that unexceptionable pronouncement.

And yet, in the submission of Amicus, the proposition that jurisdiction over Petitioner may be established only pursuant to the FSIA does not entail the conclusion that this case must be dismissed on remand. The FSIA codifies a restrictive theory of immunity, and there are numerous circumstances in which a foreign state will be required to answer and to defend a suit in U.S. courts. 28 U.S.C. § 1605, 1607. The one of arguable applicability to the facts of this case is contained in 28 U.S.C. § 1605(a)(1): the waiver of immunity "by implication."

B. Waiver of Sovereign Immunity

Before the FSIA was enacted, the courts were very reluctant to find that states had waived their immunity from suit "by implication." Implied waivers were found, before 1976, in three types of cases: when states agreed to arbitration, when they agreed that contractual disputes would be resolved under another state's law, and when they pleaded to a complaint without asserting the defense of immunity. See Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370, 377 (7th Cir. 1985).

Whatever the law before the FSIA, in the days of executive branch "suggestions of immunity" that were essentially unreviewable by the courts, there is no reason in precedent or policy to apply the same reasoning now. It is open to the courts to find a sovereign to have waived its immunity

"by implication" when the sovereign's acts have been so flagrant in their disregard for fundamental norms of international law as to call into question its capacity to claim the special status that attaches to members of the international community.

There are actions by which a sovereign implicitly waives its immunity from jurisdiction in foreign courts, just as there are actions by which an individual becomes subject to "universal jurisdiction," and waives his ability to claim, for example, that he has inadequate contact with the forum to justify requiring him to defend himself there. Over an individual, universal jurisdiction arises with respect to acts universally condemned, so that the perpetrator has become hostis humani generis, an enemy of all mankind.^{3/}
See, e.g., Matter of the Extradition

of Demjanjuk, 612 F. Supp. 544, 556 (N.D. Ohio 1985), aff'd, 762 F.2d 1012 (6th Cir. 1985), cert. den., 475 U.S. 1016 (1986).

The analogous acts of sovereigns, those which entail the loss of such special jurisdictional privileges as immunity, are acts in violation of jus cogens, peremptory norms of international law that permit no derogation. Restatement (Third) of Foreign Relations Law, § 102, note k. These norms are the basic rules of conduct: no state may torture or murder its citizens; no state may deliberately cause "disappearances," or trade in slaves, or commit genocide. Jus Cogens is always binding on states; by contrast, jus dispositivum

3/ The waiver of objections to jurisdiction applies in both civil and criminal cases. See Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).

derives from their consent, and may be changed when that consent no longer obtains. See D.F. Klein, A Theory for the Application of the Customary International Law of Human Rights, 13 Yale J. Int'l L. 332 (1988). Since deviation from jus cogens is not permitted to a state under any circumstances, a sovereign committing such a deviation relinquishes its right to be treated as such, and waives its immunity to jurisdiction "by implication."^{4/}

To acknowledge the existence of jus cogens norms of public international law is not thereby to accept any particular principle as entitled to that status.

^{4/} Every grant of immunity is subject, pursuant to the FSIA, to "existing international agreements to which the United States is a party." 28 U.S.C. § 1604. To the extent that immunity would be inconsistent with such an agreement, it must also be denied.

Yet since there exist rules of law so fundamental that their violation is incompatible with international recognition of sovereignty, the issue at stake in the case before the Court becomes somewhat different from the one addressed by Chief Judge Feinberg. For the concept of jus cogens as expounded here by Amicus suggests that states can, by their conduct, waive sovereign immunity "by implication," and hence that jurisdiction over them may be fully compatible with the FSIA.

Amicus expresses no view on whether Petitioner's attack upon Respondents' neutral ship on the high seas constituted a concomitant attack on such a peremptory norm. For while every complaint against a foreign sovereign will assert a violation of international law, the claim that a jus cogens norm was violated will be judged by a

necessarily stricter standard. Whether such a claim can be made out here is a different question from that considered below, and it deserves full briefing and full consideration on remand. If Argentina violated jus cogens, then jurisdiction over it is proper under the FSIA; if it did not, and if no other FSIA exception applies, then Petitioner is immune from the jurisdiction of the district court and the complaints should have been dismissed.^{5/} Since this issue was not addressed by the district court or the court of appeals, and was no part of this Court's writ of certiorari, Amicus suggests that the proper course

^{5/} If Petitioner's immunity has been waived under the FSIA, then its arguments about in personam jurisdiction--Petitioner's Brief, pp. 34-48--fail, since they depend upon the claim that subject matter jurisdiction is lacking. See 28 U.S.C. § 1330(b); Verlinden, 461 U.S. at 485 n. 5.

would be to have this case remanded for a determination of whether the norm of international law protecting the rights of neutral shipping has or has not become a peremptory norm from which no derogation may be permitted.

Such a resolution of the case before this Court would:

- 1) uphold the exclusivity of the FSIA as the basis for jurisdiction over Petitioner;
- 2) recognize the international principle that a state acting in violation of jus cogens thereby waives its claim to the special privileges (such as sovereign immunity) unique to states; and
- 3) defer to a later day, when the issue is fully briefed (whether in this case after remand or a subsequent one), the question of which norms have acceded to the level of jus cogens.

C. Conclusion

Amicus respectfully submits that the decision of the Second Circuit was erroneous to the extent that it found jurisdiction over Petitioner outside the FSIA, but that the assertion of jurisdiction may ultimately be correct if Argentina's conduct in destroying the HERCULES deprived it of sovereign immunity "by implication," within 28 U.S.C. § 1605(a) (or if some other FSIA exception is applicable). Whether that is the case depends upon an analysis of the norm of public international law whose violation is at the heart of the complaint. But that issue has not been briefed, and should not now be decided.

III. This Case Presents No Question Concerning the Meaning or Scope of 28 U.S.C. § 1350.

A. Introduction

For the reasons set forth above,

jurisdiction in this case turns exclusively on 28 U.S.C. § 1330(a). If Argentina's immunity has been waived, the FSIA provides jurisdiction and the suit may go forward; otherwise, it may not. Respondents' reliance upon 28 U.S.C. § 1350 (sometimes called "the Alien Tort Claims Act") as a basis of jurisdiction is misplaced, not because of a misreading of that statute, but because the exclusivity of the FSIA preempts any consideration of § 1350.

Amicus respectfully urges that no examination of 28 U.S.C. § 1350 is needed for proper resolution of this case. Given the extremely important and complex jurisprudence of the Alien Tort Claims Act, involving developments in the area of human rights law far removed from the issues presented here, this case should not be the occasion for the first Supreme Court treatment of a

statute as venerable as a provision (§ 9(b)) of the First Judiciary Act of 1789.^{6/} The Solicitor General's casual, illogical, and historically groundless suggestions concerning the interpretation of § 1350--at variance with Department of Justice views spanning nearly two centuries--should not cause this Court to venture beyond what is necessary to resolve the case at bar. Moreover, the United States correctly noted in its brief in support of the petition for certiorari that this issue is not presented for review.

B. The Modern History of 28
U.S.C. § 1350

The Alien Tort Claims Act, passed

^{6/} Section 1350 was discussed by this Court in O'Reilly de Camara v. Brooke, 209 U.S. 45 (1908), but that case ultimately turned upon whether the action was one "in tort only," and not upon questions of international law or its significance within the law of the United States.

as part of the First Judiciary Act of 1789, was intended to insure that aliens' tort claims raising issues of international law could be adjudicated in federal rather than state courts. This Court has recognized it as one of several statutes "reflecting a concern for uniformity in this country's dealings with foreign nations and ... a desire to give matters of international significance to the jurisdiction of federal institutions." Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 427 n. 25 (1964).

The Alien Tort Claims Act has been accepted as the exclusive basis for federal jurisdiction in a line of modern cases: Adra v. Clift, 195 F. Supp. 875 (D. Md. 1961); Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980), on remand, 577 F. Supp. 860 (E.D.N.Y. 1984); and Forti v. Suarez-Mason, 672 F. Supp. 1531

(N.D. Cal. 1987).

In Filartiga, the plaintiffs sued a Paraguayan living in the United States for gross violation of fundamental human rights -- the torture and summary execution of their son and brother, Joelito Filartiga. The United States, in an Amicus brief jointly submitted by the Departments of Justice and State argued that § 1350 jurisdiction is proper where aliens sue for tortious injuries committed in violation of customary international law, and where the alleged tortfeasor has sufficient contacts with the forum to render him liable to suit there. Memorandum for the United States As Amicus Curiae submitted in Filartiga v. Pena-Irala, reprinted in 19 I.L.M. 585, 601-06 (1980).

The Court of Appeals for the Second Circuit adopted the view expressed by

the United States, and other courts have subsequently followed it. Filartiga, 630 F.2d 876; Forti v. Suarez-Mason, 672 F. Supp. 1531 (N.D. Cal. 1987) (Jensen, J.); see also Tel Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1985) (Edwards, J., concurring); Guinto v. Marcos, 654 F. Supp. 276 (S.D. Cal. 1986); Von Dardel v. USSR, 623 F. Supp. 246 (D.D.C. 1985).^{7/}

^{7/} The Alien Tort Claims Act has also been the subject of a virtually unprecedented amount of scholarly commentary, the consensus of which is that § 1350 "was intended to avoid local bias in aliens' suits and to obtain uniform judicial interpretation and application of the law in cases implicating international concerns." See e.g., Note, Enforcing the Customary International Law of Human Rights in Federal Court, 74 Calif. L. Rev. 127, 132-33 (1986); Randall, Federal Jurisdiction Over International Law Claims: Inquiries Into the Alien Tort Statute, 18 N.Y.U. Int'l L. & Pol. 1, 11-31 (1985); Blum & Steinhart, Federal Jurisdiction Over International Human Rights Claims: The Alien Tort Claims Act

Most recently, in Forti, two Argentine citizens brought suit against an Argentine in the United States for torture, prolonged arbitrary detention, disappearance, and summary execution. Judge D. Lowell Jensen upheld jurisdiction in an exhaustive opinion, stating that "Congress intended § 1350 to provide concurrent federal jurisdiction over alien tort claims alleging treaty or customary international law violations in order to facilitate federal oversight of matters involving foreign relations and international law." Forti, 672 F. Supp. at 1540 n. 6;

After Filartiga v. Pena-Irala, 22 Harv. Int'l L.J. 53, 87-97 (1981); D'Amato, The Alien Tort Statute and the Founding of the Constitution, 82 Am. J. Int'l L. 62-67 (1988). These and other scholarly authorities provide a rich historical analysis of the Act, and demonstrate that its initial enactment in 1789 flowed directly from the Framers' concern that international law matters should be heard in federal courts.

see also Adra v. Clift, 195 F. Supp. at 865.

Both Forti and Filartiga could have been brought in state court, under the common law principle of "transitory torts," which provides that a tortfeasor's liability follows him wherever he goes. See McKenna v. Fisk, 42 U.S. (1 How.) 241, 248 (1843) (citing Mostyn v. Fabrigas, 1 Cowp. 161 (1774); Slater v. Mexican National R.R. Co., 194 U.S. 120, 126 (1904)). Section 1350 simply permits the suit to be brought in federal court when it raises important questions of international law. This follows from the eighteenth century concern that matters potentially affecting foreign affairs be the exclusive province of the federal government. See Dickinson, The Law of Nations as Part of the National Law of the United States (parts I & II), 101 U.

Penn. L. Rev. 26, 792 (1952-53).

The human rights cases are different from this case in two significant respects. First, the defendants have been individuals, not sovereigns, and thus the FSIA is not an issue. Second, the cases involve violations of core norms of international human rights law. These norms are assigned an elevated status in international law, above treaties and ordinary customary law. Thus, Section 702 of the Restatement (Third) of Foreign Relations Law (1987), entitled "Customary International Law of Human Rights," lists a number of acts, including torture, slavery, prolonged arbitrary detention, and disappearances, as peremptory, non-derogable norms, i.e., norms that cannot be violated under any circumstances. See Tel-Oren, 726 F.2d at 781 (Edwards, J., concurring).

Because this case involves neither an individual defendant nor a violation of an international human rights norm, the Court's decision in this case need not and should not disrupt this settled body of jurisprudence.

Such human rights cases against individuals also present issues very different from those presented here. There is no split among the Circuits on the construction and application of the Alien Tort Claims Act in that context. Indeed, this Court denied certiorari on the only case to attempt to raise directly the issue of construction of the statute. Tel-Oren v. Libyan Arab Republic, 470 U.S. 1003 (1985). Human rights cases continue to percolate in the lower courts; indeed the Court of Appeals for the Ninth Circuit is currently considering all of the § 1350 human rights issues in a consolidated

appeal of several cases brought against former Philippine President Ferdinand Marcos. Trajano v. Marcos, Nos. 86-2448, 86-2496, 86-15039, 87-1706, 87-1707 (9th Cir., argued March 1988).

Another significant consequence of Filartiga^{8/} and subsequent decisions applying the Alien Tort Claims Act lies in the discussions of incorporating international law, including customary international law and especially the customary international law of human rights, into the law of the United States. While the principle of incorpo-

^{8/} The Filartiga holding has been discussed at great length by the U.S. Court of Appeals for the District of Columbia Circuit, Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984), cert. den., 470 U.S. 1003 (1985). One judge said that he thought the case wrongly decided, Tel-Oren, 726 F.2d at 826, n. 5 (Robb, J., concurring), while Judge Edwards emphatically endorsed the Filartiga holding. 726 F.2d at 776-77 (Edwards, J., concurring).

ration is not new--see, e.g., The Paquete Habana, 175 U.S. 677, 700 (1900)--its modern manifestation is very significant. It has encouraged courts to consider even constitutional rights in the context of evolving international standards. Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382 (10th Cir. 1981). See, e.g., Thompson v. Oklahoma, 108 S. Ct. 2687, 2696 (1988). It has permitted reliance in U.S. courts upon international legal norms protecting human rights, and it has underscored their legal and binding (as opposed to their moral and hortatory) nature. It has illustrated the proposition, in the words of Judge Eugene Nickerson, that "plainly international 'law' does not consist of mere benevolent yearnings never to be given effect." Filartiga, 577 F. Supp. at 863.

Section 1350 has also given rise to

considerable controversy. In Tel-Oren, for example, Judges Edwards and Bork disagreed sharply on whether the reference to "the law of nations" in the statute is to international law in 1789 (Judge Bork) or international law today (Judge Edwards). They disagreed too on whether, to establish jurisdiction under § 1350, a plaintiff must show not only a consensus on the existence of an international norm, but also consensus on the availability of domestic judicial remedies to enforce it.

These are difficult questions. But this is not the case in which they should be addressed or resolved. This case turns on the much more straightforward matter of the proper construction of the FSIA.

C. The Solicitor General's
Suggested Construction
of Section 1350 Is Contrary
to All Relevant
Authority and Should Be
Rejected.

The Solicitor General argues in a footnote that § 1350 does not apply to extraterritorial torts, and that neither it nor international law provides a "cause of action" in such cases. Brief of the United States as Amicus Curiae, at 28-29 n. 26. Both suggestions have been soundly rejected by courts, scholars, and previous Justice Departments, and they should not be accepted by this Court.

On its face, § 1350 provides federal jurisdiction for "any civil action by an alien for a tort only, committed in violation of the law of nations." 28 U.S.C. § 1350 (emphasis added). The Solicitor General would rewrite the statute to require aliens not only to meet the requirements Congress articu-

lated in § 1350, but also to show that (1) the tort was committed inside the United States or by a person who has a "nexus to the United States or its nationals"; and (2) the tort violates "an Act of Congress that extends the substantive law of the United States to wrongs committed by one alien against another outside of the United States and creates a private cause of action for a violation." Brief of the United States, at 28-29 n. 26. Neither of these novel jurisdictional "conditions" appears anywhere in the text or legislative history of the statute, or in the body of judicial precedent construing it. Nor should the passing comments in the Solicitor General's footnote be the occasion for this Court to rewrite the Alien Tort Claims Act.

When arguing for a strict construction of the FSIA (a construction that

Amicus submits is the correct one), the Solicitor General notes that statutory language must be regarded as conclusive unless there is clear legislative history to the contrary, and jurisdictional statutes in particular must be "'construed with precision and with fidelity to the terms by which Congress expressed its wishes.'" Brief of the United States, at 9, quoting Cheng Fan Kwok v, INS, 392 U.S. 206, 212 (1968); see also Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980). Yet he invites a conceptually different approach to the Alien Tort Claims Act. Neither logic not history, neither precedent nor policy provides support for the proposed interpretation of § 1350.

Not surprisingly, no court has accepted the Solicitor General's novel "territorial" restriction. See Randall,

supra, 18 N.Y.U. J. Int'l L. & Pol. at 62 (§ 1350 jurisdiction "has never been denied on the ground that the statute itself does not confer jurisdiction over extraterritorial tort actions").^{9/}

The Solicitor General's alternative suggestion requiring an Act of Congress extending the substantive law of the United States to disputes between aliens abroad, and expressly providing a private cause of action for violations, would render § 1350 meaningless (there are no such statutes). Moreover, it ignores the consistent interpretation by the courts and previous Justice Departments that the Alien Tort Claims Act itself provides a right of action.

The courts have consistently held

^{9/} Whatever "nexus" between the defendant and the forum is required would be satisfied whenever the defendant is subject to the personal jurisdiction of the courts.

that 28 U.S.C. § 1350 provides a right of action. Filartiga, 630 F.2d at 887; Tel-Oren, 726 F.2d at 780 (Edwards, J., concurring); Forti, 672 F. Supp. at 1539; Guinto v. Marcos, 654 F. Supp. at 279-80; Von Dardel v. USSR, 623 F. Supp. at 256-59. Moreover, for nearly two centuries, from 1795 to 1980, the Justice Department consistently took the position that § 1350 provided a right of action for a civil remedy to aliens tortiously injured in violation of international law.^{10/}

The Alien Tort Claims Act is a

^{10/} 1 Op. Att'y Gen. 57, 59 (1795) (§ 1350 provides British citizen with a civil "remedy" for injuries suffered in Africa); 26 Op. Att'y Gen. 250, 252-53 (§ 1350 "provides a forum and a right of action"); Memorandum for the United States As Amicus Curiae submitted in Filartiga v. Pena-Irala, reprinted in 19 I.L.M. 585, 601-06 (1980) (tort in violation of the law of nations gives rise to a judicially enforceable remedy under 28 U.S.C. § 1350).

vital mechanism for ensuring that the fundamental tenets of international human rights law have legal meaning, and that torturers, murderers, slave traders, and other international outlaws do not find safe haven in the United States. Amicus, an organization concerned with the advancement of international human rights, urges the Court not to undermine these important developments in a case that should be dealt with by construction of the FSIA, and in which the complex and sensitive questions to which § 1350 gives rise have not been briefed.

D. Conclusion

In this case, any discussion of 28 U.S.C. § 1350 will necessarily be obiter. Either there is jurisdiction over Petitioner pursuant to the FSIA or there is not. The Alien Tort Claims Act--notwithstanding Respondents' con-

tentions in their complaints and in their briefs--has nothing to do with it. This Court should decline the invitation to address that Act, its meaning or its scope, and should specifically reject the casual suggestion of the Solicitor General to limit it.

PROPOSED RESOLUTION

For the foregoing reasons, Amicus Curiae (The International Human Rights Law Group) respectfully submits that the Second Circuit erred in extending jurisdiction over Petitioner otherwise than pursuant to the Foreign Sovereign Immunities Act; that jurisdiction is proper if, and only if, one of the exceptions to immunity set out in that Act

obtains (a question to be resolved in the courts below after full briefing and deliberation); and that, given this premise, no issue concerning the meaning or scope of 28 U.S.C. § 1350 is presented for this Court's determination.

Respectfully submitted,

Harry A. Inman*
Steven M. Schneebaum

Patton, Boggs & Blow
2550 M Street, N.W.
Washington, D.C. 20037
(202) 457-6000

*Counsel of Record

Amy Young
Larry Garber

International Human Rights
Law Group
733 15th Street, N.W.
Washington, D.C. 20005
(202) 639-8016

Of Counsel

August 30, 1988